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FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

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NICHOLAS JOHNSON
H. REX LEE
CHARLOTTE T. REID
RICHARD E. WILEY
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F.C.C. 73-762

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMBINATION ADVERTISING RATES AND OTHER JOINT SALES PRACTICES	Docket No. 19789

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

(Adopted July 18, 1973; Released July 23, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has recently received many inquiries and requests for rulings concerning its policies as to combination advertising rates and other joint sales practices involving broadcasters. Similar questions have been raised as to cable television systems. It is the purpose of this Notice of Inquiry and Notice of Proposed Rule Making to gather additional information on certain aspects of our policies in this area and their application to certain situations, and to consider codifying those policies, or parts of them.

2. The Commission has frequently stated that although it is not charged with administering the anti-trust laws, it will take cognizance of the policies behind those laws in making its own public interest findings. For example, the Commission has ruled that the limited monopoly of the use of a particular frequency shall not be used as a trade weapon to gain a competitive advantage in a nonbroadcast field, *WFLI, Inc.*, 13 FCC 2d 846 (1968), and has specifically disapproved of a rate package between a licensee and a commonly owned nonbroadcast business, *Sarkes Tarzian, Inc.*, 23 FCC 2d 221, 18 RR 2d 693 (1970). The Commission has by rule (73.658(i)) prohibited a TV network from representing its affiliates for the sale of non-network time, *Network Representation of Stations in National Spot Sales*, 27 FCC 697 (1959). On January 31, 1963, the Commission issued a Public Notice concerning combination advertising rates, FCC 63-83, 24 RR 930. A copy of that Public Notice is attached for ease of reference. The Commission there stated essentially that separately owned stations serving the same area should be competitors, and that the selling of such stations in combination raised questions as to the extent of the competition and as to the policies underlying the antitrust laws. It was stated that combination rates conflict with Commission policy and the public interest. The Notice also stated that the prohibition against combination rates could not be avoided by indirect action; e.g., having an advertising agency offer combination rates on behalf of two or more separately owned clients that are broadcast licensees serving the same area. Combination rates are permissible for commonly owned stations unless the practice

104-003—73——1

is used to unfairly advance a competitive position. See *Indianapolis Broadcasting, Inc.*, 22 FCC 421, 509 (1957).

3. In *Midcontinent Broadcasting Company of Wisconsin, Inc.*, 11 RR 2d 1081 (1967), the Commission found that two commonly owned television stations serving different areas required national advertisers to buy time on both stations during or adjacent to periods when the stations were identically programmed. No forced combination rates were imposed on local or regional advertisers at any time, or on national advertisers when the stations were separately programmed. The Commission held:

> . . . any policy which requires a time buyer to purchase time on a station in order to obtain time on another station is anti-competitive in nature and, as such, is contrary to the purposes of the antitrust laws, and is against the public interest. A multiple owner who is able to sell time on one of his stations because a buyer desires to purchase time on another enjoys an unfair advantage over competitors who either do not have such leverage or do not employ it. (11 RR 2d at 1082).[1]

4. In *Golden West Broadcasters*, 16 FCC 2d 918 (1969), the Commission considered its cross-interest policy as applied to sales representatives. The petitioner in that case alleged that Metromedia, licensee of Station KNEW–TV, San Francisco, California, owned a national spot sales firm called Metro TV Sales that represented another television station in the same market; namely, Station KTVU–TV, licensed to Cox Broadcasting Co. In fact, it appears that Metro TV Sales resigned as Metromedia's KNEW–TV representative so that it could handle the KTVU–TV account. The petitioner also alleged that Storer Broadcasting Co. and Golden West Broadcasters, both licensees of AM stations in Los Angeles, had formed a joint venture called Major Market Radio, Inc., which was the spot sales representative for Golden West's Station KMPC, Los Angeles. The Commission stated:

> We are of the view that representation of a station by a licensee or licensee-owned organization which operates a station in the same service in the same area gives the licensee-representative a large stake in the financial well-being of the station it represents and that this relationship necessarily militates against competition by the two stations. (16 FCC 2d at 921)

The conclusion was that:

> . . . the representation of a station by a sales representative owned wholly or partially by the licensee of a competing station in the same community or service area is a violation of longstanding Commission policy proscribing cross-interests by licensees in more than a single station in the same service in the same areas. (16 FCC 2d at 920–921)

The Commission stated that the cross-interest policy was based on its concern for the potential impairment of competition, so that it did not need to find actual injury to competition, citing *Shenandoah Life Insurance Co.*, 19 RR 1 (1959).

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[1] In a subsequent case the Commission did not apply this policy to a situation involving a parent television station and its 100 percent satellite. The Commission stated that as a 100 percent satellite, the station ". . . does nothing more than rebroadcast the programs of the parent station, including advertisements. As long as the station remains a 100-percent satellite, with no means of originating programs or advertising locally, time is sold, by the very nature of a 100-percent satellite operation, for both . . . markets." *Midcontinent Broadcasting Company of Wisconsin, Inc.*, 12 FCC 2d 111, 113, 12 RR 2d 763, 766 (1968). A station that is primarily a satellite, as contrasted to a 100 percent satellite, has the capability for local originations and would not come under the exception set out in this case.

5. We are here asking for information concerning our basic policies in this area and, more particularly, information and comments on the applicability of our policies to specific situations. At this point there is one area where we believe that change may be appropriate. In *FM Group Sales, Inc.*, 2 RR 2d 1110 (1964), we did permit combination rates between FM stations serving the same area, subject to specified limitations, designed to encourage the competitive position of FM stations vis-a-vis AM stations. In the nine years that have passed since that decision, the economic position of FM stations as a whole has substantially improved. We are inclined to believe that the ruling in that case may no longer be appropriate. However, before issuing a ruling, we think that more information, especially as to the extent of such combined FM sales practices, is appropriate and questions on this subject are included below.

6. Those filing comments and information in response to the questions set out below are requested to bear in mind that we are not seeking to minimize competition. Rather, we are seeking to maintain a healthy, competitive, economic environment for broadcasting, consistent with the public interest and the policies underlying the antitrust laws. With that background, we turn to the specific questions we have concerning this area.

7. In some cases, the Commission has stated that separately owned stations serving substantially the same market or area may not have combination rates. In another case, the Commission acquiesced in a combination rate where separately owned stations had only a minimal overlap of their contours. In order to assure arm's length competition, what standard should be used in defining "substantially the same market or area?" Or should a definition based on overlap of specified contours be used? If so, what contours? Would a standard similar to the "community encompassment" standard used in the multiple ownership rules be appropriate? (See Sections 73.35(a), 73.240(a)(1) and 73.636 (a)(1) of the Commission's Rules).

8. The Commission presently permits commonly owned stations in the same market to have combination rates, assuming the practice is not employed to advance unfairly a competitive position, regardless of whether the stations simulcast or have the same general format. Should the Commission continue to permit such combination rates? Or should they be prohibited if the combined rate is less than the sum of the separate rates offered by the licensee? If discounts are permitted, at what point do such discounts "unfairly advance a competitive position" or what guidelines should be used in making that determination?

9. The Commission presently permits commonly owned stations in different markets to have combination rates, assuming that the practice is not employed to advance unfairly a competitive position. Should the Commission continue to permit such combination rates? Or should they be prohibited if the combined rate is less than the sum of separate rates offered by the licensee? If discounts are permitted, at what point do such discounts "unfairly advance a competitive position" or what guidelines should be used in making that determination?

10. Should the prohibition against forced combination rates be applied to commonly owned AM–FM combinations in the same market during such periods as they are simulcasting? What additional costs

can be anticipated by such a prohibition? Should the prohibition be applied to all markets or should smaller markets be exempt? If so, how should "smaller market" be defined?

11. Should the prohibition against sales representation of a station by a licensee or licensee-owned sales organization that operates a competing station in the same service in the same area be expanded to include stations not in the same service? For example, should a sales representative owned by a television station be prohibited from representing an AM or FM station in the same area? Should the prohibition be applied in the same service if the two stations do not compete for the same audiences? For example, a black-oriented AM station owns a sales organization. May it represent a Spanish-language AM station in the same market? A country and western music station? If so, what showing should be required to establish that the stations do not compete?

12. Should a sales representative be permitted to represent two or more stations in the same market: (a) if the stations are in the same services?; (b) if the stations are in different services?; (c) if the stations are in the same service but allegedly appeal to different audiences?

13. Are there any separately owned FM stations in the same area or market that have combined rate plans similar to that approved in *FM Group Sales, Inc., supra?* If so, what stations are involved? What percentage of total revenues of each station are obtained through such combined efforts? What would the effect of prohibiting such practices be on the stations involved?

14. Are there any reasons why combination rates between cable television systems and broadcast licensees should not be treated in the same manner as combination rates between broadcasters? If so, in what manner and why should combination rates between cable television systems and broadcast licensees be accorded different treatment?

15. Those filing comments may also provide any additional pertinent information they believe will be useful to the Commission in its inquiry.

16. The Commission further believes that it is appropriate to designate this proceeding as one of proposed rule making. Such rules may codify the existing policies as set out in the Public Notices and cases cited above, and the additional matters about which more information is sought in paragraphs 7 through and including 14, above. The Commission recognizes that in view of the nature of the problems presented, it may be appropriate to issue a further notice of proposed rule making delineating precise proposals. On the other hand, the information received may lead us to conclude that rules, in all or some areas, should be adopted without further notice. In this way the Commission will have the flexibility to take the course of action that appears appropriate in the circumstances.

17. Authority for the institution of this proceeding, and adoption of rules concerning the matters involved, is found in Sections 4(i), 303(f), (g) and (r), and 403 of the Communications Act of 1934, as amended.

18. Pursuant to the applicable procedures set out in Section 1.415 of the Commission's Rules, interested persons may file comments on or

before November 1, 1973, and reply comments on or before December 3, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

19. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Acting Secretary.*

[F.C.C. 63-83—Public Notice]

COMBINATION ADVERTISING RATES

Information coming to the attention of the Commission has indicated that in certain instances two or more broadcast licensees, serving substantially the same areas, have entered into agreements whereby, either directly or indirectly through a representative acting for all, combination rates are offered to advertisers who purchase time for the broadcast of commercial spot announcements by all participating stations.

In the Commission's view, combination rate agreements or practices by independent stations serving the same area raise serious questions under the policies underlying the antitrust laws (15 U.S.C. 1), conflict with established Commission policy, and are contrary to the public interest.

Although the Commission does not enforce the antitrust laws as such, it has the authority, and, indeed, the responsibility, to take cognizance of the public policy considerations underlying such laws. *National Broadcasting Company* v. *U.S.*, 319 U.S. 190, 222–224. *Report on Uniform Policy as to Violations by Applicants of Laws of United States*, 1 Pike & Fischer, R.R. 21:495; 91:497. Thus, "The Commission, although not charged with the duty of enforcing the law, should administer its regulatory power with respect to broadcasting in the light of the purpose for which the Sherman Act was designed to achieve." *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, May 1941. See also, *Mansfield Journal* v. *Federal Communications Commission*, 180 F. 2d 28, 33–34.

It is clear that inherent in combination rate agreements is the element of price fixing by independent parties who should be competing with one another. Such price-fixing practices are obviously contrary to the public interest. Cf. *Radio Fort Wayne, Inc.*, 9 Pike & Fischer, R.R. 1221, 1222k.

These combination rate practices by independent stations serving substantially the same areas are also inconsistent with the long-standing policy evolved under the Commission's multiple ownership

rules, 47 C.F.R. 3.35, 2.240, 3.636. Thus, in *Minnesota Broadcasting Corp.*, 4 Pike & Fischer, R.R. 1377, 1379, the Commission stated:

> In applying the policies set forth in these rules, the Commission has consistently refused to permit *any* common ownership between broadcast stations in the same city ***in the interest of promoting and maintaining full competition between such stations.*** (Emphasis supplied.)

The above combination rate practices are in flagrant conflict with this basic policy of promoting "arms length competition" among broadcast stations. *Shenandoah Life Insurance Company*, 19 Pike & Fischer, R.R. 1, 2. See also, *West Shore Broadcasting Company*, 18 Pike & Fischer, R.R. 376, 378.

We wish to make clear that our ruling is not designed solely to insure that the public, including advertising members of the public, find the field of broadcasting to be one of open and fair competition. The broadcast station in the area is also entitled to face broadcast competitors—not combinations. Otherwise, the station not participating in such combination rate arrangements might lose substantial revenues because of these improper arrangements—to the possible detriment of its overall operation and its service to the public in its area.

For the foregoing reasons, the Commission has concluded that the above-described combination rate arrangements are not in the public interest. The Commission expects that the publication of this notice will apprise licensees participating in such arrangements of the necessity of modifying their commercial practices to the extent necessary to comply with the views expressed herein, and that such licensees will act with reasonable diligence in so complying.

Adopted January 30, 1963.

F.C.C. 73-758

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CONTINENTAL TELEPHONE CORP. For Consent To Transfer of Control of the Following Corporations Holding Domestic Public Radio Licenses or Construction Permits: Vashon Telephone Co., Evergreen Telephone Co., Ilwaco Telephone Co., Beaver State Telephone Co., Cascade Telephone Co., and Olympic Telephone Co.	File Nos. 8400-C1-TC-(1)-73, 8402-C1-TC-(6)-73, 8447-C2-TC-73, 8403-C1-TC-(1)-73, 8405-C1-TC-(3)-73, 8444-C2-TC-73, and 8530-C1-TC-73

MEMORANDUM OPINION AND ORDER

(Adopted July 18, 1973; Released July 20, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it the above captioned applications for consent to transfer control of various radio licenses filed by Continental Telephone Corporation (Continental), on May 17, 1973. Pacific Power and Light Company (Pacific) filed on June 6, 1973, a petition to dismiss these applications which was opposed by Continental.[1]

2. Continental proposes to acquire a controlling interest in Telephone Utilities, Inc. (TU) by a public offer to exchange some of its common stock for the outstanding shares of T.U., the parent company of Vashon Telephone Company, Evergreen Telephone Company, Ilwaco Telephone Company, Beaver State Telephone Company, Cascade Telephone Company, and Olympic Telephone Company. Under the terms of its offer, Continental has offered to exchange 0.6 of a share of its common stock for each share of the common stock of T.U., and 1.25 shares of its common stock for each share of the preferred stock of T.U. Shareholders of T.U. may accept Continental's offer to tender their shares until July 20, 1973, and Continental may accept the resultant shareholder offer to exchange their shares until July 23, 1973. Continental's acceptance of the tendered shares is expressly conditioned upon Commission approval by July 23, 1973, and if such approval has not been granted by that date, the T.U. shareholders may withdraw their certificates so deposited. As of July 12, 1973, 1,033,301 T.U. common shares had been tendered, constituting approximately 40.1 percent of the T.U. common shares outstanding.

[1] In addition to the above applications the proposed transaction includes several pending applications involving licenses in the Telephone Maintenance Service. Since such applications are unopposed, they will be acted on at staff level in a manner consistent with our determination on the captioned applications.

3. Continental's tender offer is opposed by T.U.'s Board of Directors which has negotiated an acquisition of control of T.U. by Pacific. On April 30, 1973, T.U.'s Board of Directors entered into an agreement with Pacific whereby T.U. would acquire all of the outstanding shares of a Pacific subsidiary, Northwestern Telephone Systems, Inc., in exchange for 1,800,000 shares of the authorized, but unissued common stock of T.U. Also, on the same date, Willamette Development Corporation, a wholly owned subsidiary of Pacific, entered into a voting trust agreement with several T.U. shareholders under which it would obtain voting rights for approximately 16 percent of those T.U. shares outstanding. By these and other transactions, Pacific expects to control approximately 51 percent of the T.U. shares then outstanding. On May 18, 1973, Pacific filed a transfer of control application for T.U., and T.U. filed a transfer of control application for Northwestern. Continental filed a Petition to Deny such applications on June 28, 1973. Pacific requested and received an extension of time until July 23, 1973 within which to file its opposition.[2] Consequently, the Pacific applications are not now ready for processing.

4. Pacific, in its petition to dismiss, claims that Continental's applications are fatally defective under § 21.20(a) of the rules because no underlying legal arrangements exist to serve as the basis of an application. Specifically, Pacific alleges that: (a) the proposed transfer is speculative; (b) the transferor and licensee portions of the application form (FCC Form 704) are unsigned and uncertified, and Continental's request to waive these requirements cannot be considered whenever the application itself is questioned; (c) an involuntary transfer under § 21.14(h)(1) of the rules must result from a court order or operation of law; and (d) Continental's proposal does not have prior Oregon authorization as required by § 21.15(c)(4) of the rules. Continental responded that it will be unable to obtain the transferor's signature until after it has assumed control of the transferor; that prior approval is necessary to avoid an unauthorized *ex post facto* transfer of control; and that letters from counsel were submitted to show that prior state authorization is not required.

5. Of primary consideration is whether the application of Continental should be considered mutually exclusive with the aforementioned applications of Pacific. There is no doubt that they are competitive since both would acquire the same licensees and only one can succeed. However, the Commission need consider two applications simultaneously only where the grant of one would preclude the grant of the other. Under this situation, we see no reason why the Commission could not grant both Continental's and Pacific's applications, provided both are found to be fully qualified and their proposals in the public interest, so that the ultimate decision will then rest with the shareholders. Such approach is consistent, we believe, with the intent of Section 310(b) of the Communications Act.

6. It would be preferable to act upon both applications simultaneously to avoid giving either applicant a possible advantage over the other. However, Pacific has requested and received an extension of time

[2] In granting the extension of time, it was noted that such extension would delay consideration of Pacific's applications. Thereafter, Pacific filed its opposition on July 16. A reply is due on July 23.

to respond to Continental's petition to deny, with knowledge that such would delay consideration of its application. However, to delay action on Continental's applications until Pacific's are ready would, under the circumstances, be unfair to Continental since its tender offer expires on July 23 as noted above. If Commission approval is not received by that date, those tendering their stock may withdraw, thereby putting Continental at a substantial disadvantage. Therefore, since Continental's applications are ready for consideration, we believe that they should be acted upon without delay. Upon the completion of the pleadings on Pacific's applications, we will endeavor to act on such applications as expeditiously as possible.

7. Continental's applications were submitted without the signatures of the licensees and the transferor and therefore would, under ordinary circumstances, have been returned as defective. However, since Section 310(b) of the Act requires prior Commission consent even in contested situations (*see TelePrompTer Cable System, Inc.*, 40 FCC 2d 1027), we cannot reasonably allow the technical requirements of the application to make it impossible for an outside party seeking control to file for and obtain prior approval. Accordingly, the requirement of the application form for these signatures was properly waived. Also, the fact that the transfer to Continental may be somewhat speculative (with regard to its ultimate consummation) is, under the circumstances, understandable and is not considered a bar to approval of the applications.

8. Section 21.15(c)(4) of the Commission's rules requires that an applicant obtain any necessary certificate or authorization from the state prior to filing an application. We note that Pacific has obtained such a certificate from the Oregon Public Utility Commissioner but Continental has not. However, Continental has submitted an opinion from Oregon counsel to the effect that it does not need such a certificate because it is not a public utility under Oregon law.[3] While this opinion may not represent a clearly established interpretation of the Oregon statutes, it does not appear that the Oregon Commissioner has taken a countervailing position.[4] Under these circumstances, we believe Continental has reasonably complied with the requirements of Section 21.115(c)(4).

9. In general, we believe that Continental is fully qualified to control the captioned licensees should it succeed. It is well experienced as a telephone carrier and has adequate financing. Therefore, we conclude that the transfer proposed herein would serve the public interest, convenience and necessity, and that Continental is technically, financially and otherwise qualified to operate the radio facilities involved.

10. Accordingly, IT IS HEREBY ORDERED that the petition to dismiss filed by Pacific Power and Light Co. IS DENIED.

11. IT IS FURTHER ORDERED that the captioned applications filed by Continental Telephone Corporation ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[3] Technically, Continental is a holding company for a number of telephone operating companies.

[4] Informal discussions with staff attorneys of the Oregon Department of Justice representing the Public Utility Commissioner have disclosed that this is a difficult question of interpretation of Oregon statutes and is not considered settled.

F.C.C. 73-706

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE DUAL-LANGUAGE TV/FM PROGRAMING IN PUERTO RICO

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 17, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has for consideration (a) the "Report of WAPA-TV Broadcasting Corporation on Dual-Language Operations" filed January 20, 1970; (b) a proposal dated February 12, 1973, by television station WAPA-TV, San Juan, Puerto Rico, for authority to expand its experimental dual-language operations to include Aguadilla-Mayaguez and Ponce, utilizing the facilities of WOLE-TV/WKJB-FM and WPAB-FM, respectively; and (c) a request dated December 29, 1972, by Ponce Television Corporation, licensee of television station WRIK-TV, Ponce, Puerto Rico, to purchase time on WPRP-FM (Ponce), WQBS-FM (San Juan), and WORA-FM (Mayaguez) in order to provide a similar dual-language service in those communities.

2. Station WAPA-TV has rendered dual-language programming in San Juan on an experimental basis for six years, originally in conjunction with WIAC-FM and presently in conjunction with WPRM-FM. Basically, the service consists of the transmission, on WPRM-FM's main channel, of the English-language soundtracks of movies shown simultaneously on WAPA-TV in Spanish. Typically, these movies are offered during prime-time hours, up to two hours daily, Monday through Saturday, with intermittent carriage of special programs including National Geographic documentaries and World Series baseball. The experimental operation has met with favorable response in Puerto Rico among English-speaking, Spanish-speaking, and bi-lingual viewers.

3. We last considered dual-language programming on July 24, 1968, when a petition for reconsideration of our earlier approval of the WAPA-TV experimental operation, filed by a now-defunct UHF English-language telecaster (Telesanjuan), was denied. *Memorandum Opinion and Order*, 14 FCC 2d 210 (1968). Denial of the relief sought by Telesanjuan was based on the apparent value and popularity of WAPA-TV's dual-language programs, coupled with Telesanjuan's failure to document, to our satisfaction, its allegations of economic injury.*[1] In response to conditions contained in the 1968 Memorandum Opinion and Order, WAPA-TV submitted, in early 1970, the above-

*[1] Telesanjuan's subsequent application for renewal of license was dismissed at the applicant's request, in 1972, for reasons unrelated to WAPA-TV's dual-language programming.

referenced report dealing with programs presented, advertising and on-air promotion, and public response. In it, WAPA–TV requested the initiation of rule making to regularize dual-language programming, and continuance of its on-going operation in the meantime.

4. In requesting approval of its island-wide dual-language proposal, WRIK–TV contends that in fairness to the television industry of Puerto Rico, all licensees interested in providing this type of service must be allowed to do so on an equal footing. We agree, and considering the unique language situation in Puerto Rico, where both English and Spanish enjoy co-equal status—TOXX–IL PRA § 51—we incline toward the view that the public interest would be served by making permanent provision, albeit limited as to hours, for dual-language operation there. There are, however, important policy questions which must be resolved before this type of operation can be regularized. For example, since persons tuned to the participating FM station do *not* receive an intelligible program without the companion video, a question obtains as to whether the FM audio is "broadcasting" within the meaning of section 3(o) of the Communications Act; i.e., ". . . the dissemination of radio communications intended to be received by the public. . . ." Moreover, what does this practice portend for UHF channel 18 in San Juan, now vacant, in terms of inhibiting the possible establishment of a new source of English-language television in Puerto Rico? And, depending on how the service is sold, can it be squared with our policies concerning joint rates and promotions? Finally, is it technically feasible to distribute program translations without the waste of spectrum space inherent in the present use of the FM station's main channel; e.g., by means of TV or FM subcarrier multiplexing techniques? Until these and other questions are answered, we are not prepared to regularize dual-language broadcasting as presently conducted by WAPA–TV.

5. These are questions which can properly be addressed only in a rule-making proceeding in which all interested parties may submit their views. We therefore intend to issue an appropriate Notice of Proposed Rule Making at an early date. Pending the institution and disposition of rule making, we feel that the public interest requires the status quo to be maintained with respect to dual-language programming presently conducted in Puerto Rico, both as to areas and populations served and hours of operation.

6. Accordingly, IT IS ORDERED, That WAPA–TV's experimental authority to conduct dual-language programming in San Juan IS EXTENDED pending the initiation and outcome of rule making, such programming NOT TO EXCEED 10 hours per week as presently authorized.

7. IT IS FURTHER ORDERED, That WAPA–TV's February 12, 1973, request for expansion of its dual-language operations to include Aguadilla-Mayaguez and Ponce WILL BE HELD IN ABEYANCE pending the outcome of rule making.

8. IT IS FURTHER ORDERED, That WRIK–TV's proposal for island-wide dual-language programming WILL ALSO BE HELD IN ABEYANCE pending the outcome of rule making.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-724

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of INTERMEDIA, INC., ASSIGNOR and AMATURO GROUP, INC., ASSIGNEE For Assignment of License of KGRV (FM), St. Louis, Mo.	File No. BALH-1754

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 11, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Commission has before it the above captioned application and a document entitled "Petition for Dismissal of Application for Construction Permit and Alternative Petition to Designate Applications for Hearing" filed by St. Charles Broadcasting Company, Inc. against both an application for construction permit for changed facilities for KGRV(FM) and against the KGRV(FM) assignment application, and responsive pleadings. This Order will deal with the Petition only insofar as it relates to the assignment application. The allegations concerning the KGRV(FM) construction permit application will be dealt with at the time that application is processed. The parties are otherwise qualified.

2. The Petitioner, St. Charles Broadcasting Company, Inc., is an applicant for a construction permit for a new FM station at St. Charles, Missouri, and it alleges that its application is mutually exclusive with the KGRV application for construction permit. The KGRV assignment application was accepted for filing on October 30, 1972, the KGRV construction permit application was accepted for filing on January 26, 1973, and the Petition was filed more than 30 days after even the latter date, on March 9, 1973. Since it was not timely filed, it will be dismissed for that reason. However, the Commission will treat the Petition as an informal complaint pursuant to Section 1.580 of the Rules and thus consider the allegations as they bear on the assignment application.

3. The petitioner notes that the construction permit application was filed on behalf of the assignee and that the responses to Sections II, III, IV-A, and VI are incorporated by reference from the assignee's portion of the KGRV assignment application. The petitioner charges that the assignee has not shown that it is financially qualified to construct the proposed change and that its survey of community needs did not include the gain area outside the existing KGRV 1 mv/m contour. It also states that both the assignor and assignee have violated Section

1.65 of the Commission's Rules by failing to amend the assignment application to show the filing of the KGRV construction permit application.

4. The programming and financial qualifications of the assignee to construct BPH–8221 will be evaluated in connection with BPH–8221. Only BALH–1754 is before the Commission now, and the Commission need only evaluate its financial and programming qualifications to purchase and operate KGRV as presently authorized. If the assignee had failed to earmark certain assets for the assignment and certain assets for the construction permit, it would be necessary to determine its financial qualifications with respect to both proposals in order to find it financially qualified for either. *Nelson Broadcasting Co.*, 4 RR 2d 87 (Rev. Bd. 1964). However, here the assignee has proposed to finance the assignment application (and two co-pending assignment applications for KLYX(FM), Clear Lake City, Texas and KQTV, St. Joseph, Missouri), on the one hand, and the construction permit application (and a co-pending construction permit application for KQTV), on the other, from two separate sources of funds. The assignee has included in its financial showing in the assignment application a separate source of financing, a bank loan, to be used for BPH–8221 and the KQTV construction permit application. The Commission is not now passing on its qualifications to construct and operate under BPH–8221. We have only determined that the applicant is financially qualified to purchase and operate the three stations as presently authorized out of funds specifically allocated for this purpose which will not be relied on for construction of any changes.

5. Similarly, the applicant's survey of community needs is adequate for the service area within the existing 1 mv/m contour of KGRV (FM). The Commission will deal with any deficiencies in the survey with respect to the gain area in the construction permit application in connection with that application. The grant of the assignment application is a finding only that the survey is adequate for the purpose of the assignment application for the station as presently authorized.

6. It is true, as petitioner says, that Intermedia did not amend the KGRV(FM) assignment application to reflect the filing of BPH–8221. However, the sales of the three stations are all one transaction described in one contract between the same seller and same buyer, and the KGRV(FM) assignment application contains several cross references to the KQTV assignment application. An amendment to the KQTV assignment application filed on March 9, 1973 discloses the filing of the KGRV(FM) construction permit application. While the information was filed 53 days after the January 15, 1973 filing of the construction permit application and not within 30 days as required by Section 1.65 of the Rules, the short delay has not caused any derogation of the public interest. While the Commission does not condone failure to comply with the filing requirements of its rules, no further action with respect to these assignment applications is warranted. *Central Broadcasting Corp.*, 19 RR 2d 427 (1970).

6. In view of the foregoing and since we have previously determined that the applicant herein is otherwise qualified; we conclude that the public interest would be served by a grant of the application.

7. Accordingly, IT IS ORDERED, that captioned application IS GRANTED and the Petition filed by St. Charles Broadcasting Co. IS DISMISSED in so far as it relates to the subject assignment application.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-644

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application by
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
For Review of Ruling on Complaint Against Station WFAI, Fayetteville, N.C.

JUNE 13, 1973.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES AND MR. KENNETH T. LYONS,
c/o James vanR. Springer,
800 Federal Bar Building,
Washington, D.C.

GENTLEMEN: This is with reference to your March 28, 1973 Application for Review of the Broadcast Bureau's February 26, 1973 ruling on your complaint against Radio Station WFAI, Fayetteville, North Carolina.

The Bureau's ruling of February 26, 1973 concluded that WFAI did not act "unreasonably in its decision that the union representation election [involving certain civilian federal employees at Fort Bragg, North Carolina] was not a controversial issue of public importance in the station's listening area," and, inasmuch as the personal attack rule (47 CFR 73.123(a)) is not applicable unless the attack occurs during the discussion of a controversial issue of public importance, your complaint that NAGE and Mr. Kenneth T. Lyons were personally attacked over WFAI's facilities did not meet the substantive requirements of Section 73.123(a). Your Application for Review contends that the Bureau's conclusion "was erroneous as a matter of fact and that it risks creating a dangerous precedent on the applicability of the Personal Attack Rule in the labor relations area—thereby raising a question of communications policy that has not been but should be considered by the Commission."

In support of your contention that the election raised a controversial issue of public importance, you state that a majority of a station's listening audience need not be directly concerned for there to be a matter of "public importance," and that when two national labor organizations are involved in a "hotly contested" union representation election which directly involves 1,230 employees and indirectly affects 6,200 out of 56,000 households in the Fayetteville area it is apparent that there is a controversial issue of public importance. In addition, you cite *WIYN Radio, Inc.*, 35 FCC 2d 175 (1970), and contend that if an attack upon the Institute for American Democracy

(IAD) as "subversive" raised a controversial issue of public importance, then an attack upon the "honestly, character and integrity" of a national labor organization and its leadership during a representation election cannot "be considered anything less."

You also take issue with the Bureau's reliance on the licensee's statement that the election involved only 1,230 employees in the area served by WFAI, which had a 1970 population of 212,000. You contend that the number of households in Cumberland County (56,000) is "a more pertinent point of comparison"; and that "in determining the number of persons directly concerned with the charges carried over WFAI, it is not accurate to consider only those immediately involved in the election," but that "*all* of the civilian government employees in the county should be counted, since all are affected by the jurisdictional conflict" between the unions involved. You state that "there are approximately 6,200 civilian federal employees in Fayetteville," and, that, assuming that "few households have more than one federal employee, . . . more than "ten percent of the households served by WFAI . . . were directly 'concerned or affected' by the offending advertisements (6,200 out of 56,000)."

It should be first pointed out that information concerning the number of civilian federal employees was not brought to the attention of the Bureau in the information provided to it by you prior to the Bureau's ruling, and that, under Section 1.115(c) of the Commission's Rules and Regulations, this information cannot properly be presented for the first time on the Application for Review. In any event, it does not demonstrate that the Bureau erred in permitting the licensee's judgment to stand, for you have provided no basis for your contention that "all civilian federal employees are affected by the jurisdictional conflict."

As the Bureau stated, before either the fairness doctrine or the personal attack rules are applicable to broadcast matters, it must first be determined that a controversial issue of public importance is involved, and this determination initially is to be made by the licensee, who is called upon to exercise his judgment on this question. The licensee stated, in response to the Bureau's inquiry:

> It is doubtful whether the Union election held at Fort Bragg was of a controversial issue of public importance . . . because a maximum of 1230 employees were involved and WFAI serves a population of two hundred twelve thousand in Cumberland County alone. The narrow controversy was limited to the two competing Unions and was not one of importance to WFAI's audience as a whole. The same comments apply to the issue as to the character of Mr. Lyons, the President of one of the Unions. The character of Mr. Lyons may have been important in the Union election, but it is highly doubtful whether it was or is of public importance in Fayetteville, North Carolina and the surrounding community. To the best of WFAI's knowledge, none of the other five stations in Fayetteville carried any broadcasts concerning the Union Elections.

We believe that the number of persons involved herein need not be a major factor in determining whether a controversial issue was presented by the broadcast of the announcements in question. The licensee here believed that the union election did not involve a controversial issue of public importance because it was a narrow controversy between two unions and not of importance to its listening audience. You have not furnished the Commission with any information to indicate

that there was a public debate or controversy in the community regarding the union election so as to create a controversial issue of public importance.[1] Unless there is such public debate or controversy, the union election appears to have been a controversy of interest only to the affected employees to which the fairness doctrine is not applicable. Absent indication of public controversy, the Commission will not overturn the judgment of the licensee. The issue is not whether the Commission would have resolved this matter differently, but whether the licensee has been arbitrary or unreasonable in its judgment. See *American Vegetarian Union*, 38 FCC 2d 1024 (1972); Application for Review denied, FCC 73–181.

To support your contention that a controversial issue of public importance is involved, you refer to "important national policies favoring fair labor relations," and state "Pursuant to Executive Order No. 11. 491 (October 29, 1969, as amended) . . . labor organizations . . . may be elected as exclusive collective bargaining agents for appropriate units of federal employees." You further state that "Any interference with the fairness of a labor representation election is inconsistent with the national labor relations policy that such elections be decided upon 'that sober and thoughtful choice which a free election is designed to reflect.'" However, the existence of a national policy in favor of fairness in representation elections does not by itself indicate that any such election constitutes a controversial issue of public importance.[2] We believe that there should also be some substantial indication that the election is a matter of general controversy in the community. Cf. *Retail Store Employees Union, Local 880 et al.* v. *FCC*, 141 U.S. App. D.C 94, 436 F. 2d 248 (1970), where not only was "The public policy of the United States . . . declared by Congress as favoring equalization of economic bargaining power between workers and the employers," but, as the Court stated, "it seems clear to us that the strike and the Union boycott were controversial issues of substantial importance within Ashtabula, the locality primarily served by WREO. The ultimate issue with regard to the boycott was simple: whether or not the public should patronize Hill's Ashtabula [store]." In the instant case, you have furnished no evidence that a decision by the public on the election was forthcoming, while in *Retail Store*, the issue was one upon which the public was called to make a decision. Of course, jurisdictional disputes between labor unions may rise to the level of controversial issues of public importance, but you have not shown that this situation is present here.

You also refer to *WIYN*, *supra*, and state that you "do not understand" how the Commission can conclude that a reference to an organization (IAD) as "subversive" can constitute a controversial issue of public importance and not find that an advertisement which accuses the president of a national labor organization as having "Mafia" con-

[1] For example, the only item apparently ever broadcast by the licensee or any other station in the community on the union election was the AFGE announcement.

[2] You filed a "Supplemental Memorandum" in support of your Application for Review in which you attached a ruling by the Department of Labor directing that a "rerun election" be conducted because the "eleventh-hour assertion in the radio announcements . . . regarding Mr. Lyons . . . could have had a significant impact on . . . the election." Although this may be of importance to the union members, we do not believe that the Department of Labor's ruling affects our determination herein.

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tacts as not constituting a controversial issue of public importance. In *WIYN* the licensee broadcast statements that IAD was a left-wing subversive organization seeking to infiltrate the local churches with communist propaganda. In holding that the attack occurred during the discussion of a controversial issue of public importance, the Commission stated:

> The broadcast in the instant case discussed the activities of IAD, a nationally known organization; discussed its alleged association with the Communists and their "propaganda" and "strategy of infiltration"; discussed its alleged objective to infiltrate the Methodist Church and American institutions; and discussed the alleged relationship of the "Far Left" to Communist objectives. The Commission finds that these issues clearly are controversial issues of public importance.

Instead of the broad issues discussed in *WIYN*, the instant case involved a jurisdictional election between two unions involving 1,230 employees. The only issue here was which union should represent the employees, and, as we have indicated, we do not believe the licensee was unreasonable in determining that this in itself was not a controversial issue of public importance which would invoke the fairness doctrine. The alleged attack was made on the President of a national union, but an attack, itself, does not constitute a controversial issue of public importance. As we stated in *Amendment of Part 73*, 8 FCC 2d 721 (1967), at 725:

> Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle.

The Bureau did admonish the licensee for its procedural handling of the matter, and we agree that its procedures in handling this type of complaint required revision. However, this is not to say that the licensee's judgment on the substantive aspect of the complaint was unreasonable. In this connection we note that on the very next day the licensee met with the complainants and offered them air time after consulting with its Washington counsel.

We believe that you have failed to establish that the licensee's judgment as to the existence of a controversial issue of public importance was unreasonable or made in bad faith, and therefore your Application for Review IS DENIED.

Commissioner Johnson dissenting; Commissioner H. Rex Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary*.

F.C.C. 73-784

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST BY THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
For inspection of records

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1973; Released July 20, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON AND H. REX LEE ABSENT.

1. The Commission has under consideration (a) the letter of February 21, 1973 from the Executive Director granting in substantial part the initial request of the National Cable Television Association, Inc. (NCTA) for inspection of records; (b) the letter of March 16, 1973 from the Executive Director denying the second request of NCTA for additional related information (40 F.C.C. 2d 134); and (c) an application for review of these determinations filed by NCTA on May 14, 1973.

2. The applicant's original request of January 11, 1973 requested access to thirty categories of material containing information primarily related to the "direct and indirect cost" to the Government of regulating the cable television industry and to the basis used for determining "value to the recipient" of the cable television regulatory program. According to NCTA the information was requested to assist it in preparing comments on the Notice of Proposed Rule Making in Docket No. 19658 (released December 27, 1972), which proposes to revise the Commission's current fee schedule. As a result of the Executive Director's response, NCTA made a second request by letter of February 23, 1973, which was more specific and which asked for "The Report of Harbridge House, Inc. done for the Federal Communications Commission under contract RC 10914, which studied and recommended proposed requirements for staffing the Commission's Cable Television Bureau in view of the Commission's increased regulation of CATV." In the same letter, NCTA also requested the Commission's Budget Estimates for Fiscal Year 1974 submitted to the Congress. The application for review renews this request with respect to categories 1, 3, 5, 13–18, 19–20, 26, 27, 28, and 29 of the original letter and with respect to the Harbridge House Report and the FY 1974 Budget Estimates specified in the second letter. The applicant also requests expeditious treatment of its application, permission to file additional comments concerning the Commission's Notice of Proposed Rule Making in Docket 19658, and Commission consideration of its comments before action increasing the CATV fees is taken.

3. Pursuant to his authority to act on inspection requests under Section 0.461(c) of the Commission's rules, 47 CFR § 0.461(c), the Executive Director, in response to NCTA's initial request, located and described for each of the 30 categories specified by NCTA the documents which related to or included the basic information underlying the Commission's current fee proposal. In this letter, NCTA was also permitted access to most of the information considered by the Commission in proposing the revised fee schedule. In response to NCTA's second and more specific request for the Harbridge House Report and the FY 1974 Budget Estimates submitted to the Congress, the Executive Director determined that the Commission would be authorized to withhold these documents from inspection because they came within the scope of two of the stated exemptions to the mandatory disclosure requirements of the Public Information Section of the Administrative Procedure Act, 5 U.S.C. § 552, commonly known as the Freedom of Information Act. As the letter explains, the study undertaken by Harbridge House for the Commission under Contract RC 10914 is essentially a management study prepared by the contractor for internal Commission use. As such it is exempt from required disclosure because it comes within exception (2) of the Act for matters such as internal procedures that are "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), and exception (5) for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5). The letter also pointed out that the Final Report had not at that time been accepted by the Commission, and that the contractor had prepared a preliminary staffing plan with the understanding that it would be modified as subsequent data were developed. With respect to the FY 1974 Budget Estimates submitted to the Congress, the letter explained that these had been prepared for the use of the appropriations committees of the Congress and that they were regarded as the property of Congress. Thus, as set forth in the letter, pursuant to Section 0.461(c)(2) of the rules, the appropriations committee was apprised of NCTA's request and we were advised that the documents should not be made available until after completion of the hearings and copies of the testimony had been released. Because the preliminary staffing plan had been used to a significant degree in preparing the FY 1974 budget submission to Congress we also determined that this study should not be made available until the budget estimates could be made public.

4. Since the time the Executive Director's actions were taken, however, the factual situation has changed with respect to the status of the documents that were withheld from NCTA's inspection. The testimony taken at the appropriations hearings has been released and the Commission has recently issued rules setting forth a new organizational plan for the Cable Television Bureau. Consequently, in regard to items 1, 5, 13–18, and 19–20, NCTA may now have access to the FY 1974 Budget Estimates submitted to the Congress as well as to the preliminary staffing plan and the Final Report prepared by Harbridge House,

Inc.[1] While the new organizational plan for the Cable Television Bureau was undergoing development and the contractor's proposals were being studied, it would have been premature to disclose the Harbridge House recommendations. Now that the organization of the Cable Television Bureau has been completed and the Commission has substantially agreed with the contractor's organizational proposals, we see no continuing need to withhold this material. It should be noted, however, that the draft Final Report was not used by the Commission in the proposal to revise the fee schedule and that the preliminary staffing plan was the Harbridge House material that the Commission relied upon in preparing its FY 1974 budget proposal to Congress.

5. NCTA has also renewed its request (originally made in item 3 of the initial request) for the documents used by the Commission to estimate the total number of CATV subscribers for the years 1973–1979. In this connection, NCTA alleges that the earlier response was "totally inaccurate and insufficient." The documents referred to in that reply were, however, the studies the Commission considered in making its assumptions as to the probable number of cable subscribers in the seventies. Page 75–a of the 1972–1973 edition of Television Factbook gives an estimated figure for the total number of cable subscribers in calendar year 1972. In addition, Exhibit III of volume 1 of the draft Harbridge House Report shows the total number of subscribers projected by the contractor through 1977. (NCTA has been furnished with a copy of this Exhibit.) One ambiguity should be clarified, however. The figures actually relied upon by the Commission for the purpose of estimating FY 1974 annual fee revenues were somewhat below the Harbridge House projection. The Commission selected a figure of 6,666,700 subscribers instead of the 6,720,000 estimated by the contractor in Exhibit III.

6. NCTA has also requested that the Commission determine whether more recent annual reports of user charges exist. As has been previously indicated in responding to item 26 of the original request, the most recent annual and inventory report of all user charges of the Commission was the one prepared in FY 1970 and NCTA has been furnished with a copy of this report. With respect to item 27, there is still in existence one work sheet which was used to develop this report and it will be made available for NCTA's inspection.

7. Finally, in regard to items 28 and 29, NCTA requests clarification concerning whether the Commission has in its files any informa-

[1] With respect to item (5), NCTA should re-examine the explanation provided in the third paragraph of the February 21, 1973 letter explaining why it would be erroneous to assume that the FY 1972 fee collections were approximately 200% of the costs of regulating the cable television industry. As explained therein, the figures used in paragraph 10 of the Notice of Proposed Rule Making did not include direct costs of other offices or bureaus (e.g., the Field Engineering Bureau) which were directly attributable to Cable Television. Nor did it include Cable Television's pro rata share of the indirect costs. In regard to item (5), NCTA should also consult the Commission's press release of June 20, 1972, which gives the total fee collections for the Cable Television Service. Further, it should be noted that the exact costs of regulating cable television have not been calculated for FY 1972 because the Commission did not utilize that year's budget for fee-estimating purposes.

With respect to the information sought in items 13–18, the Commission does not have any additional information on the direct costs of regulating cable television for FY 1970 through FY 1973.

In regard to the category of information described in items 19–20 (the *approximate* direct and indirect costs of regulating cable television for FY 1974 and an identification and breakdown of these costs), the Commission has a work sheet used to arrive at the totals cited in paragraph 5 of the Notice and NCTA may examine this.

tion considered by the Commission in determining the value to the recipient of the privileges granted to the CATV industry. As indicated by the Executive Director, the Commission does not have any information other than that set forth in the paragraphs cited in the Notice of Proposed Rule Making. In short, no documents in categories 28 and 29 are being withheld from NCTA's inspection.

8. Accordingly, IT IS ORDERED, that the request for inspection of the materials described in the Application for Review filed on May 14, 1973 by the National Cable Television Association, Inc. IS GRANTED with respect to the (1) "Preliminary FY 1974 Staffing Plan for the Cable Television Bureau," dated July 2, 1972, (2) the Harbridge House Final Report prepared for the Commission under contract RC 10914, (3) the Fiscal Year 1974 Budget Estimates submitted to the Congress, and (4) the two worksheets described above. The Commission recognizes that NCTA wants to file additional comments in this rule making proceeding based on the material made available today. NCTA should, therefore, arrange to examine this material and pursuant to the applicable procedures, within a reasonable period of time, submit its comments with a request that they be accepted for consideration by the Commission. Arrangements for inspection and copying may be made with the Office of the Executive Director.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE COMMISSION APPROVAL OF RECOMMENDATIONS OF THE NATIONAL INDUSTRY ADVISORY COMMITTEE	}

JUNE 21, 1973.

Mr. J. FRANCIS TAYLOR, Jr.,
Chairman, National Industry Advisory Committee, Aeronautical Radio, Inc., 2551 Riva Road, Annapolis, Md.

DEAR MR. TAYLOR: The Commission, in formal session, considered and approved the recommendations of the National Industry Advisory Committee (NIAC), Broadcast Services Subcommittee, concerning voluntary participation of the facilities, systems and personnel of the National Public Radio Network (NPR) and the Public Broadcasting Service (PBS) audio network in the Emergency Broadcast System (EBS), dated February 21, 1973 (BC–2–1973).

This action was adopted by the Commission on June 21, 1973 with Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Reid and Wiley concurring and Hooks absent.

BY DIRECTION OF THE COMMISSION,
DEAN BURCH, *Chairman.*

F.C.C. 73-780

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 91 OF THE COMMISSION'S RULES TO PERMIT EXPANDED USE OF TONE AND IMPULSE SIGNALING IN THE PETROLEUM RADIO SERVICE	Docket No. 19790 RM-1680

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING

(Adopted July 18, 1973; Released July 23, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Central Committee on Communication Facilities of the American Petroleum Institute (API) has filed a petition requesting an amendment of Part 91 of the Commission's Rules to permit expanded use of tone and impulse signaling on Petroleum Radio Service land mobile frequencies above 25 MHz. The rule changes sought by API would permit Petroleum Radio Service licensees to utilize tone and impulse signaling to verify status of equipment, to adjust operating conditions, to correct abnormal conditions, and to provide automatic confirmation of equipment or process status.

2. Present Petroleum Service Rules permit tone or impulse signaling on mobile service frequencies above 25 MHz on a secondary basis to indicate failure, or impending failure of equipment, or to indicate abnormal conditions which, if not promptly corrected, would result in failure of facilities. The API petition refers to the Power Radio Service Rules, amended in Docket 13812 (42 FCC 1081) and 15427 (42 FCC 1191) permitting the wider use of tone impulse signaling; and asserts that the petroleum industry is faced with many of the same types of problems which are encountered by the utilities. API contends, however, that petroleum requirements are somewhat broader because failures may involve pressures, flow rates, and fluid levels rather than "on" and "off" situations generally encountered in the Power Service.

3. The Commission agrees that a somewhat wider use of petroleum land mobile frequencies for certain point-to-point non-voice transmissions should be permitted. These point-to-point transmissions on mobile frequencies should be on a secondary basis subject to the condition that harmful interference is not caused to the primary operation of any other licensee on the particular frequency. We are not however, proposing to permit use of land mobile service frequencies for fixed telemetry and telecommand purposes. As in the past, we expect point-to-point telemetry to be conducted on frequencies allocated for fixed use. Additional frequencies for telemetry have been made available in Docket 19451 (FCC 72-173, 37-FR-4454), released March 3, 1972. We

also believe that the rules governing the Power Radio Service should be revised so as to be consistent with the more permissive rules we are proposing for the petroleum service. Since there are many similarities between power service and petroleum service operational requirements, amendment of the rules to provide correspondence between the two services is desirable. Therefore, we propose to amend the Petroleum and Power Radio Service Rules to provide for the following:

(a) To permit manually activated transmission of tone or impulse signals to verify equipment status, to adjust operating conditions, or to correct any abnormal conditions which would otherwise result in the failure of facilities.
(b) To permit automatic indication of any abnormal condition in facilities.
(c) To permit automatic confirmation that the manual correction has been accomplished.
(d) To permit point-to-point signaling on a secondary non-interference basis to radiotelephone operations.
(e) To implement "state-of-the-art" digital techniques by reducing the message length permitted (includes any redundancy desired) to two seconds for new installations after the effective date of these new rules.
(f) To provide for signaling techniques which are not included under A1, A2 and F1, F2 emission by adding the A9 and F9 designators.

4. The Commission has received similar petitions in the matter of expanded use of tone and impulse signaling from other radio services. (Docket 19662 FCC 72–1165 proposes to amend the public safety rules to permit expanded, fixed signaling and alarming.) In view of the active interest which this type of rule change has engendered, and in order that the Commission may take comprehensive action after considering all pertinent questions, the Commission requests comments particularly on the following questions:

(a) Are there any other services in Parts 89, 91, or 93 which do not have this capability and which feel they require similar rule changes? If so, what are the reasons therefor?
(b) Should there be a limit to the number of interrogations during a specific period of time so as the licensee would not be transmitting continuously?

5. This Notice of proposed rule making and inquiry is issued pursuant to the authority contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before October 1, 1973, and reply comments on or before October 16, 1973. Relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

6. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and fourteen copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part 91 of the Commission's Rules is amended as follows:

1. Section 91.252 is revised to read as follows.

§ 91.252 Availability and use of Service.

* * * * * * *

(f) In the Power Radio Services, fixed operations may be authorized for tone and impulse signaling on mobile service frequencies above 25 MHz subject to the condition that harmful interference is not caused to the primary mobile service operation of any licensee subject to the following limitations:

(1) * * *

(iii) Manually supervised transmission from the point where alarms are received as may be necessary to verify status of equipment or processes, to adjust operating conditions, or to correct any abnormal conditions which would otherwise result in the immediate or continued failure of the production, transmission or distribution facilities.

(iv) Automatic confirmation of status, or that an operation or correction intended to be accomplished in subdivision (iii) of this subparagraph has occurred.

(2) For equipment installed after 1973, the maximum duration of a non-voice transmission, including automatic repeats, may not exceed two seconds.

* * * * * * *

(6) The plate power input to the final radio frequency stage of any transmitter shall not exceed 50 watts.

(7) Only A1, A2, A9, F1, F2, or F9 emissions will be authorized for such operational fixed stations.

(8) Operational fixed stations licensed under the provisions of this paragraph are exempt from the requirements of § 91.54(e) (2), 91.107(c) and 91.152.

(9) Any operational fixed station authorized under the provisions of this paragraph shall be equipped with a device which will automatically de-activate the transmitter and require manual re-set in the event the carrier of such transmitter remains on for a period in excess of three minutes.

2. Section 91.253 is amended by deleting the text of paragraphs (b) and (c) and substituting the word "Reserved".

§ 91.253 Station limitations.

* * * * * * *

(b) Reserved

(c) Reserved

* * * * * * *

3. Section 91.302 is revised to read as follows:

§ 91.302 Availability and use of service.

* * * * * * *

(d) In the Petroleum Radio Services, fixed operations may be authorized for tone and impulse signaling on mobile service frequencies above 25 MHz subject to the condition that harmful interference is not caused to the primary mobile service operation of any other licensee subject to the following limitations:

(1) * * *

(i) * * *

(ii) * * *

(iii) Manually supervised transmission from the point where alarms are received as may be necessary to verify status of equipment or processes, to adjust operating conditions, or to correct any abnormal conditions which would otherwise result in the immediate or continued failure of the production, collection, refining, or transporting facilities.

(iv) Automatic confirmation of status, or that an operation or correction intended to be accomplished in subdivision (iii) of this paragraph has occurred.

(2) For equipment installed after 1973, the maximum duration of a non-voice transmission, including automatic repeats, may not exceed two seconds.

(3) * * *

(4) * * *

(5) * * *

(6) The plate power input to the final radio frequency stage of any transmitter shall not exceed 50 watts.

(7) Only A1, A2, A9, F1, F2, or F9 emissions will be authorized for such operational fixed stations.

(8) Operational fixed stations licensed under the provisions of this paragraph are exempt from the requirements of § 91.54(e) (2), 91.107(e), and 91.152.

(9) Any operational fixed station authorized under the provisions of this paragraph shall be equipped with a device which will automatically de-activate the transmitter and require manual re-set in the event the carrier of such transmitter remains on for a period in excess of three minutes.

4. Section 91.303 is amended by deleting the text of paragraph (b) and substituting the word "Reserved".

§ 91.303 Station limitations.

* * * * * * *

(b) Reserved

* * * * * * *

F.C.C. 73-752

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE, SECTION 73.658(k) OF THE COMMISSION'S RULES	
Petitions of	
NATIONAL BROADCASTING CO., INC. (NBC)	Docket No. 19622
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)	RM-1967
KINGSTIP COMMUNICATIONS, INC. (KHFI-TV, AUSTIN, TEX.) For deletion of the rule	RM-1935 RM-1940
MCA, INC. To permit the use of "off-network" material plus 25% new material	RM-1929

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1973; Released July 16, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Clarification and Modification of Issues" filed June 28, 1973 by the National Association of Independent Television Producers (NAITP). The Commission issued a Notice of Oral Argument, FCC 73-657, June 18, 1973, which set the above captioned proceeding for oral argument on July 30 and 31, 1973. This proceeding is an inquiry into and proposed rule-making for the prime time access rule, Section 73.658(k) of the Commission's Rules. By its petition, NAITP requests that the Commission conform the issues stated in the Notice to those recited in the Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 19622 [1] which instituted this proceeding.

2. The Petition for "Modification and Clarification" states that the Notice of Oral Argument points to two issues which the Commission is particularly eager to receive argument: (1) The impact of the prime time access rule on U.S. program production and employment; (2) the programs which are likely to be shown on stations during the access period in 1973-74. This, NAITP argues, is improper for four reasons. It is contrary to basic fairness and penalizes parties who have already responded by written comment in the proceedings thus far. It is contrary to the Commission's own definition of the relevant issues in this

[1] FCC 72-957, 37 FCC 2d 900, released October 30, 1972.

proceeding as set forth in the Notice of October 30, 1972. It improperly includes issues which pertain to taste and program judgment of television broadcasters which are not designed to elicit information regarding the operation of the prime time access rule. Finally, NAITP argues that the Notice improperly includes issues which are irrelevant to this proceeding and beyond the Commission's authority to consider.

3. The NAITP petition asks that a further notice of oral argument be issued which clarifies the two issues stated and expands the scope of the oral argument. NAITP asks that the issue of impact upon the program production industry be either removed or reframed so as to comport with Commission jurisdiction, which is stated to be the "larger and more effective use of radio in the public interest." [2] NAITP also asks that the issue of program data from the access period be reframed to include available programming as well as that actually scheduled. Finally, NAITP requests that we issue a new order which specifies all of the issues to be covered in the oral argument, which should include all those matters stated as areas of inquiry in the Notice of October 30, 1972.

DISCUSSION AND CONCLUSIONS

4. Upon consideration, we are of the view that this petition should be denied. The Notice of Oral Argument does not limit argument to the two areas specified by NAITP, i.e., impact upon the production industry and programming in the access period. Paragraph 3 of the Notice states: "The Commission is not specifying the subjects to which discussion is to be limited. We *call attention* to two areas which we *hope* will be covered." (Emphasis added). To say that this language limits the scope of the oral argument is, at best, erroneous, and the arguments made by NAITP against the alleged limitation of issues are without foundation. The petition also states that the Commission may not properly inquire into the areas of impact on employment in the program production industry as this is beyond our jurisdiction. The Notice clearly states that "[c]omments are invited as to what extent this is a consideration relevant to our evaluation of the rule—." Thus, this area is a subject for contention in the additional comments and the oral argument. Finally, NAITP misconstrues what is sought in regard to programming. We are not dealing with matters of taste or judgment on the part of broadcasters; rather, the Commission is concerned with how the prime time access rule is operating in terms of number and types of syndicated and local programs (U.S. and foreign-produced) which are likely to be shown in the predictable future.

5. In view of the foregoing, the "Petition for Clarification and Modification of Issues" filed on June 28, 1973 by the National Association of Independent Television Producers (NAITP), seeking modification and expansion of topics specified in the Commission's Notice of Oral Argument, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[2] 47 U.S.C. § 303(g).

F.C.C. 73-746

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

AMENDMENT OF PART 81 OF THE RULES TO DELETE REQUIREMENTS THAT CLASS II PUBLIC COAST STATIONS IN THE MARITIME SERVICE APPLY FOR OR PROVIDE VERY HIGH FREQUENCY (VHF) SERVICE	Docket No. 19719

REPORT AND ORDER

(Adopted July 11, 1973; Released July 12, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. On April 16, 1973, we released a Notice of Proposed Rule Making in this Docket. The Notice specified that the times for filing comments and reply comments were May 24 and June 4, 1973, respectively. Those dates have passed, and comments were filed by Marine Telephone Co., Inc. and American Institute of Merchant Shipping (AIMS).

2. The Notice explained that we proposed to change our policy concerning the furnishing of very high frequency (Class III) public correspondence service by Class II stations operating in the medium and high frequencies. This policy was contained in Sections 81.303(c) and 81.304(e) of the rules and in paragraph 45 of the First Report and Order in Docket No. 18307 (23 FCC 2d 553), released June 16, 1970. Those rule sections required Class II station licensees, essentially, to apply for authority to furnish VHF service, and paragraph 45 in the cited Report and Order stated that in processing any such applications, account would be taken of existing VHF public stations only to the extent that electrical interference would be caused to existing VHF service. Paragraph 45 provided, in effect, preferential status to most applications by licensees of Class II stations for VHF authority as against other applications for VHF authority in a particular locality.

3. AIMS is in agreement with the Commission that VHF Maritime Service has reached a level of usage where it is not necessary to force Class II stations to provide VHF service as a means of ensuring adequate VHF coverage. AIMS feels, however, that combining the VHF and 2–4 MHz services in a single station wherever possible has operational advantages. In support of their position, they point out that persons ashore, who are placing a call to a ship equipped with both VHF and 2–4 MHz radiotelephone, may not know which to select. In many instances the vessel's position will not be known precisely enough to follow strictly geographical guidelines. If both services are provided by a single station, the station operator may select the best band based on the operator's knowledge of the coverage of each band and the estimated position of the ship. If he fails to make contact or has a poor link on the first band, then he may switch bands. If the

services are separated, the person originating the call would have to try one service and then switch to the others if the call was not completed. There might be considerable delay encountered, as the stations would undoubtedly make several attempts to complete the call before suggesting it be placed via a competitor. As a ship nears port, such a delay in establishing communications can be very expensive.

4. The Commission recognizes that there are some operational advantages to one station having both facilities, and this rule making does not preclude such an operation. In any event, operational unity is certainly a factor that will be considered in conjunction with other circumstances in connection with action on any application. Such action will, of course, be consistent with the provisions of Section 81.303 and 81.304 as amended herein.

5. Marine Telephone Company, Inc., the licensee of several Public Coast stations—Class III–B, fully supports adoption of the rule amendments proposed in the instant proceeding. Marine believes that the policy of previously granting preferential treatment to Class II Public Coast station licensees, insofar as new VHF facilities are concerned, was an appropriate course to adopt in 1970. However, it feels that the growth of VHF public correspondence coast facilities now makes it clear that there is no longer any requirement to continue such extreme preferences.

6. For the reasons set forth above and in the Notice of Proposed Rule Making, the policy will be changed and the rules will be amended as proposed and as set forth in the attached Appendix. Applications for Class II stations to provide VHF Public Coast service now on file or hereafter received will be processed on the basis of the conditions specified in Section 81.303 of the rules that apply to all other applications for such service.

7. In view of the foregoing, IT IS ORDERED, That pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 81 of the rules IS AMENDED, effective August 24, 1973, as set forth in the attached Appendix.

8. IT IS FURTHER ORDERED, That, the proceeding in this Docket IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part 81 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 81.303(c) is amended to read as follows:

§ 81.303 Duplication of service.

* * * * * * *

(c) Only one public coast station operating on frequencies below 27,500 kHz will be authorized to serve any area whose ship-shore communication needs can be adequately served by a single radio communication facility.

§ 81.304 [Amended]

2. Section 81.304(e) is deleted and designated as [Reserved]

F.C.C. 73R–268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
QUINNIPIAC VALLEY SERVICE, INC., WALLINGFORD, CONN.	Docket No. 19686 File No. BP–14832
RADIO RIDGEFIELD, INC., RIDGEFIELD, CONN.	Docket No. 19687
For Construction Permits	File No. BP–18494

MEMORANDUM OPINION AND ORDER

(Adopted July 17, 1973; Released July 18, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Before the Review Board for consideration is a motion to enlarge issues, filed March 29, 1973, by Westport Broadcasting Company (Westport).[1] Intervenor Westport [2] requests an expansion of the existing Suburban Community issue specified against Radio Ridgefield, as well as the addition of site availability and suitability issues against the same applicant. In light of the pre-designation action taken by the Commission in this proceeding,[3] the fact that Westport's delay in filing was relatively short (ten days), and that no prejudice would result from acceptance of the motion, the Board is of the view that good cause for late filing has been shown and the motion will be considered on its merits. *Cf. Charlottesville Broadcasting Corp.* (*WINA*), 1 FCC 2d 1323, 6 RR 2d 744 (1965), review denied, FCC 66–3.

SUBURBAN COMMUNITY ISSUE

2. In its designation Order, *supra*, the Commission specified a Suburban Community issue against Radio Ridgefield because its proposed 5 mv/m contour would penetrate Danbury, Connecticut, a city of over 50,000, which is more than twice the size of Ridgefield, the proposed city of license. Westport requests an expansion of this issue in order to determine whether Radio Ridgefield will realistically provide a transmission service to Westport and Norwalk, Connecticut (in addition to Danbury) or any combination of these communities. In support of this request, Westport alleges that, based upon 31 measurements made on approximately the 140° radial of Station WPUT(AM), Putnam, New York, its chief engineer has determined that the actual conductivity

[1] Other related pleadings before the Board for consideration are: (a) opposition, filed April 11, 1973, by Radio Ridgefield, Inc. (Radio Ridgefield); (b) Broadcast Bureau's comments, filed April 11, 1973; and (c) reply, filed April 24, 1973, by Westport.

[2] By Order, FCC 73M–469, released April 17, 1973, Westport was granted leave to intervene.

[3] Upon simultaneously accepting and designating Radio Ridgefield's application for hearing (39 FCC 2d 948, 38 F.R. 5679, published March 2, 1973), the Commission waived the requirements of Section 1.580(b) of the Rules, which provides that no application will be acted upon less than 30 days following issuance of public notice of the acceptance of the application.

between the area of Radio Ridgefield's site and the Westport/Norwalk area is greater than that shown by Figure M–3 of the Rules upon which Radio Ridgefield has allegedly relied in its engineering exhibits. As a result of these calculations, Westport's chief engineer concludes that it appears that Radio Ridgefield's 5.0 mv/m contour would significantly penetrate both Westport and Norwalk.[4] A Suburban Community question is raised with respect to both communities, Westport contends, because Norwalk's 1970 population is 79,113 persons, which is more than twice the population of Ridgefield Center or township. Although Westport's population is less than 50,000, movant notes that Westport's 1970 population was almost five times that of Ridgefield Center's (5,878) and argues that this substantial disparity, together with the fact that Radio Ridgefield is proposing to operate with substantial power, justifies expansion of the existing issue.

3. The Review Board agrees with the Broadcast Bureau and Radio Ridgefield that Westport's request does not comport with the requirements of Section 1.229(c) of the Rules which provides that a motion to enlarge shall contain specific allegations of fact sufficient to support the action requested. Among other things, no field intensity data was submitted by Westport to substantiate its allegation. Thus, in attempting to dispute Radio Ridgefield's use of M–3 theoretical values, petitioner has failed to comply with any of the requirements which govern both the taking and submission of data relating to field intensity measurements required by Sections 73.153 and 73.186 of the Rules. In the absence of field intensity measurements properly taken and presented, the Commission's soil conductivity map (Figure M–3) is the sole standard for determining the location of pertinent contours. *Norman O. Protsman*, 14 RR 484, 486 (1956).[5]

SITE AVAILABILITY AND SUITABILITY ISSUES

4. In support of its request for site availability and suitability issues, Westport alleges that there is no indication that Radio Ridgefield has secured permission to construct its antenna on the proposed swampland site from either the State, which owns most of the proposed site, or the Town of Ridgefield, which owns the remaining portion. On the contrary, petitioner alleges that Radio Ridgefield's proposal would be inconsistent with the State's wetlands conservation program whereby certain portions of the area would be flooded. Westport avers that Connecticut's Director of Land Administration and Uses, Department of Environmental Protection, advised its chief engineer that the State intends to dam a brook running through the swamp which will flood portions of it, and, moreover, that he knows of no plans to build transmitter towers on the land. Petitioner contends that, in any event, Radio Ridgefield's proposed site is presently unsuitable for construction of the proposed towers since the land would have to be filled or drained. Finally, Westport asserts that if the site is subject to intermittent flood-

[4] In support of its request, Westport has submitted a sworn statement, executed by its chief engineer. However, there is no documentation attached to support the engineer's conclusions.

[5] In its reply pleading, petitioner recognizes that it may not have adequately supported its request, and states that it therefore does "not press this request."

ing, this could impose difficulties in maintaining the adjustment of Radio Ridgefield's proposed antenna array.

5. Petitioner's allegations are insufficient to warrant the addition of site availability or suitability issues against Radio Ridgefield. Based upon the existence of a wetlands conservation program in Connecticut, which allegedly would result in flooding a portion of the area near the Town of Ridgefield, Westport contends that the specified site will not be available for its intended use.[6] However, the petitioner has not shown what steps, if any, have been proposed or taken to implement this program; rather, Westport merely speculates as to the possible, and highly conjectural, effect of the program upon the site's availability. Absent some showing that the State has taken some definitive step which would preclude construction of Radio Ridgefield's antenna system there is no basis for questioning the applicant's representation that the site is available. See *K & M Broadcasters, Inc.*, 20 FCC 2d 436, 17 RR 2d 845 (1969); *Mt. Carmel Broadcasting Co.*, 13 FCC 2d 151, 13 RR 2d 207 (1968). In any event there is an absence of any factual allegations which would indicate that Radio Ridgefield would not be able to obtain approval of its site plans from the appropriate authorities, even if portions of the vicinity were to be flooded according to the very generally alleged State plan.[7] In these circumstances, a site availability issue must be denied. Finally, Westport has offered no specific factual allegations to support the general assertions that the proposed antenna system could not be effectuated in a swampland area, or, for that matter, even if the conservation program were to be implemented, that any necessary modification of the ground system would measurably affect the operation of the antenna system. See *K & M Broadcasters, Inc., supra.*

6. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed March 29, 1973, by Westport Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[6] We also note in this regard that the allegations of the Director of Land Administration and Uses are hearsay and do not comport with the requirements of Rule 1.229(c).

[7] It is well established that the Commission will not attempt to prejudge actions pertaining to land planning or use which are within the jurisdiction of local authorities, absent a showing that an applicant will be unable to obtain site approval from local authorities. See *Massilon Broadcasting Co.*, FCC 61-1102, 22 RR 95 (1961); *El Camino Broadcasting Corp.*, 14 FCC 2d 361, 13 RR 2d 1260 (1968); *John Hutton Corp.*, 27 FCC 2d 214, 20 RR 2d 1159 (1971).

F.C.C. 73-749

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF SMILES OF KINSTON, INC., LICENSEE OF RADIO STATION WISP, KINSTON, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 11, 1973; Released July 16, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated August 9, 1972 issued to Smiles of Kinston, Inc., the licensee of Radio Station WISP, Kinston, Inc., North Carolina, and (2) the licensee's response, dated September 20, 1972, to the Notice of Apparent Liability.

2. Station WISP is licensed to operate with power of 1,000 watts from 5:30 a.m. to 7:00 p.m. Eastern Standard Time (EST) in August, from 5:45 a.m. to 6:15 p.m. EST in September, and from 6:15 a.m. to 5:30 p.m. EST in October. At all other times the station is licensed to operate with power of 250 watts.

3. The Notice of Apparent Liability issued in this proceeding indicated that the licensee was subject to apparent liability for forfeiture in the amount of two thousand dollars ($2,000) for repeated or willful failure to abide by the terms of the station license and repeated or willful violation of Section 73.87 of the Commission's Rules in that the station was operated with power of 1,000 watts on the following dates until the following times:

August 7, 1971—8:15 p.m. EDT (7:15 p.m. EST).
August 21, 1971—8:25 p.m. EDT (7:25 p.m. EST).
September 4, 1971—7:29 p.m. EDT (6:29 p.m. EST).
September 5, 1971—7:20 p.m. EDT (6:20 p.m. EST).
September 6, 1971—7:20 p.m. EDT (6:20 p.m. EST).
September 10, 1971—7:30 p.m. EDT (6:30 p.m. EST).
September 11, 1971—7:22 p.m. EDT (6:22 p.m. EST).
September 12, 1971—7:31 p.m. EDT (6:31 p.m. EST).
September 21, 1971—7:29 p.m. EDT (6:29 p.m. EST).
September 22, 1971—7:24 p.m. EDT (6:24 p.m. EST).
October 2, 1971—6:49 p.m. EDT (5:49 p.m. EST).
October 3, 1971—6:35 p.m. EDT (5:35 p.m. EST).
October 4, 1971—7:25 p.m. EDT (6:25 p.m. EST).
October 9, 1971—6:34 p.m. EDT (5:34 p.m. EST).
October 10, 1971—6:39 p.m. EDT (5:39 p.m. EST).
October 11, 1971—6:34 p.m. EDT (5:34 p.m. EST).

October 16, 1971—6:35 p.m. EDT (5:35 p.m. EST).
October 23, 1971—6:50 p.m. EST (5:50 p.m. EST).
October 30, 1971—6:37 p.m. EDT (5:37 p.m. EST).

4. The licensee responds to the Notice of Apparent Liability admitting that the violations occurred and acknowledging that it should receive some fine, but states that the amount of apparent liability is "entirely too heavy" under the circumstances then prevailing. The licensee outlines these circumstances as follows:

> 1. We submit letter from our General Manager, Mr. Richard Surles relative to numerous changes in the position of Operations Director, who should have caught these mistakes.[1]
>
> 2. In almost every instance of the violations, the operator was a part-time trainee.
>
> 3. Of the 19 days that the power was not reduced on time—17 of the days the reduction was 4 to 20 minutes late—10 of the days was 4 to 9 minutes late. So it was definitely not something that would give WISP any advantage.[2]
>
> 4. On November 1, 1971, the mistake was caught by our own people and no violation occurred from that time forth to the date of inspection on November 29, 1971. This certainly showed that management was conscious of its responsibilities.

5. It is well established that licensees are responsible for the acts or omissions of their employees, *International Broadcasting Corp.*, 19 FCC 2d 793 (1967), and that licensees will not be excused from past violations because of subsequent corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Although the licensee corrected the operation prior to the inspection, the violations occurred over a considerable period of time and licensees are expected to operate in compliance with Commission requirements. We find that the violations occurred as above-stated and were repeated. Having found that the violations were repeated it is unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. We have considered all of the circumstances described by the licensee in the response to the Notice of Apparent Liability and we are not persuaded that the licensee has provided grounds which would merit a reduction in the amount of forfeiture.

6. In view of the foregoing, IT IS ORDERED, That Smiles of Kinston, Inc., the licensee of Radio Station WISP, Kinston, North Carolina FORFEIT to the United States the sum of two thousand dollars ($2,000) for the licensee's repeated failure to abide by the terms and provisions of the station license for WISP and for repeated violation of Section 73.87 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for remission or mitigation of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

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[1] The attached letter of the General Manager indicates that, after several changes in the position of Operations Manager, a new Operations Manager, who had been in training for a year, was appointed on August 1, 1971 and that he proved satisfactory. This was prior to the violations in August, September, and October, 1971.

[2] It is also to be noted that the operation with unauthorized power extended on occasions for 20, 25, and 55 minutes, and on four other occasions extended for 15 minutes or more.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Smiles of Kinston, Inc., licensee of Radio Station WISP, Kinston, North Carolina.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-673

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application by
SUN NEWSPAPERS, INC.
For Review of Broadcast Bureau Denial
of Complaint Re Midwest Radio-TV,
Inc.

JUNE 21, 1973.

SUN NEWSPAPERS, INC.,
c/o Stambler and Shrinsky,
1737 DeSales Street NW.,
Washington, D.C.

GENTLEMEN: This is with reference to your March 19, 1973 Application for Review of the Broadcast Bureau's February 16, 1973 ruling.[1]

The gravamen of your initial January 15, 1973 complaint was that Midwest Radio-TV, Inc., licensee of WCCO and WCCO–TV, Minneapolis, Minnesota, engaged in anti-competitive activity by intentionally distorting its news broadcasts about the termination of 13 editorial employees at Sun Newspapers, Inc. (Sun), and that this was done to imply financial trouble at Sun in order to increase the competitive advantage in the Minneapolis area of the Minneapolis Tribune, which is affiliated in ownership with WCCO–AM–TV. The Bureau found that the broadcasts herein did not, in and of themselves, indicate that the licensee was using its facilities "in an anti-competitive way or otherwise to subordinate the public interest to its private interest." You repeat your contentions in your Application for Review and cite *WFLI, Inc.*, 13 FCC 2d 846 (1968); *Sarkes Tarzian, Inc.*, 23 FCC 2d 221 (1970); *Waterman Broadcasting Corporation of Texas*, 28 FCC 2d 348 (1971); and *Fuqua Communications, Inc.*, 30 FCC 2d 94 (1971) as standing for the proposition that any use of a licensee's broadcast facilities to gain a competitive advantage violates the Commission's policies in the areas of anti-trust activities and unfair business practices. The information before the Commission indicates that the layoffs which took place at Sun were the subject of several news items by WCCO and WCCO–TV and that Sun was afforded an opportunity by the stations to clarify whatever "innuendos" it believed resulted from these items.

As the Bureau stated in its February 16 letter, the selection and presentation of specific program material, including the news, are responsibilities of the licensee, and as a general rule the Commission

[1] Licensee filed an opposition on April 13 and you filed a reply to the opposition on April 26.

will not review the news judgment of broadcasters or the quality of their news and public affairs programming.

With specific regard to your allegation that the stations deliberately distorted the news, we have stated before that the Commission, as the governmental licensing agency, should take action in the sensitive area of news reporting only when it has substantial extrinsic evidence of deliberate distortion, such as, for example, evidence that a licensee ordered the news to be distorted.[2] We do not believe that the facts as set forth in your January 15, 1973 letter warranted any Commission action, as they contained no such extrinsic evidence to support your contention.

In your Application for Review of the staff ruling you state that your complaint "is not directed against the program material *per se*," but that since the broadcasts repeated "false rumors and half-truths—for the purpose of gaining a competitive advantage over Sun in the owner-related field of newspaper publishing," they should be reviewed "in light of comparison with coverage given much larger lay-offs in substantial local industries." However, your request clearly asks the Commission to review news content and judgment, and this is the area the Commission has determined it is inappropriate for it to enter. You refer to the "other anticompetitive history of the WCCO stewardship of these Stations" as "extrinsic evidence of the distortion here involved." However, as the Bureau pointed out in its ruling, the Commission, in granting the renewal of the licenses of WCCO and WCCO–TV, "considered serious anticompetitive charges raised against Midwest" and concluded that Midwest had "satisfactorily answered the serious public interest questions" which had been raised. See *Midwest Radio-Television, Inc.*, 24 FCC 2d 625 (1970).

The cases which you have cited in support of your contentions involve such different questions as refusals to sell time to those competing with station interests (as in *WFLI*); package rate plans given by a newspaper, a wholly-owned subsidiary of the licensee, which enabled newspaper advertisers to receive a credit on ads broadcast over the licensee's facility (*Sarkes Tarzian*); or discrimination in rates for station employees such as to give them unfair competitive advantage in nonbroadcast enterprises (*Waterman* and *Fuqua*). As indicated above, you have presented no evidence to the Commission to substantiate any charge that WCCO or WCCO–TV broadcast the material in question to further their private interests. None of the cases which you have cited required Commission examination of program content to determine accuracy or good faith.

Inasmuch as you have not presented any new evidence which would lead us to believe that WCCO or WCCO–TV's actions violated any Commission rule or policy, were unreasonable or were made in bad faith, your Application for Review IS DENIED.

Commissioners Burch, Chairman; and Johnson concurring in the result; Commissioner Hooks absent.

By Direction of the Commission,
Ben F. Waple, *Secretary*.

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[2] *Hunger in America*, 20 FCC 2d 143 (1969); *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969); *ABC, CBS and NBC, (Democratic Convention)*, 16 FCC 2d 650 (1969).

F.C.C. 73–757

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2, 89, 91 AND 93 OF THE COMMISSION'S RULES TO PERMIT NON-GOVERNMENT FIXED AND LAND MOBILE TELEMETERING IN THE BAND 1427–1435 MHz ON A SECONDARY BASIS	Docket No. 19451

REPORT AND ORDER

(Adopted July 18, 1973; Released July 24, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. On February 24, 1972, the Commission adopted a Notice of Proposed Rule Making in the above entitled matter which was published in the Federal Register on March 3, 1972 (37 FR 4454; FCC 72–173, No. 74864). The Notice proposed to permit non-Government fixed and land mobile telemetering operation in the band 1427–1435 MHz on a secondary basis to existing services. Comments were to be filed on or before May 9, 1972, and reply comments on or before May 23, 1972.

2. Comments were filed by Central Committee on Communication Facilities of the American Petroleum Institute (API), National Association of Manufacturers (NAM), Special Industrial Radio Service Associations, Inc. (SIRSA), Utilities Telecommunications Council (UTC), Associated Public-Safety Communications Officers, Inc. (APCO), and Aerospace and Flight Test Radio Coordinating Council (AFTRCC). AFTRCC also filed reply comments.

3. In the Notice the Commission proposed to limit non-Government use of the band to local area industrial, public safety and land transportation fixed and land mobile telemetering applications to be coordinated with Government users on a case-by-case basis. Extensive telemetering operations requiring wide area frequency clearance were not to be authorized. Nor were systems to be authorized which, because of safety or other factors, could not tolerate interference from the primary users of this band. Telecommand was also to be permitted in conjunction with the new telemetering operations in the band.

4. UTC supports the rule changes as proposed in the Notice. API generally supports adoption of the proposed Rule amendments. It believes, however, that the limitation to telecommand transmissions by base stations should be modified, although no specific proposed modifications are offered. It requests that the frequencies proposed for point-to-point systems also be made available for offshore environments. API also urges that the band be split into two segments and that systems be required to operate with a three megahertz channel separation in order to provide a basis for future channelizing. API does

not envision a deluge of applications from those eligible in the Petroleum Service to use the frequencies. The Commission anticipates that new uses for this band may incorporate techniques not now employed within the various services. Therefore, to split the band at this time appears to be unwarranted. Moreover, to permit other than telecommand for transmission from base stations would open the band to broader non-Government applications than anticipated in this proceeding consistent with our agreement with the Office of Telecommunications Policy. Finally, eligible applicants in the Petroleum Service are in no way constrained from telemetering operations in an offshore environment as long as each area of use can be cleared in the coordination process.

5. NAM is not enthusiastic about the band offered for land mobile telemetering use. It estimates that the price of transmitters in the 1427–1435 MHz band at two to thirteen times as great as those in the 216–220 MHz band and the cost of receivers at twice those for the lower band. NAM urges the Commission to continue its search for more suitable spectrum space for land mobile telemetering. We should point out that the band 1427–1435 MHz is not being proposed as a substitute for another band nor to serve as a basis for future denial of spectrum space for applications for which it would not be suitable. NAM does see the band as useful for fixed telemetry and suggests that the Part 91 amendments should be broad enough to encompass transmission regardless of source, including aircraft. Transmissions from aircraft, when in flight, are inherently wide area operations and would be very difficult or impossible to coordinate with primary Government users. Therefore, we are adhering to our original proposal to prohibit the use of airborne devices.

6. SIRSA also does not foresee at this time any large number of Special Industrial requests for assignments in the band, although it does mention some possible land mobile applications which may develop. SIRSA also suggests the splitting of the band in order to provide for an appropriate separation of assigned two-way frequencies. However, as indicated above, the Commission does not see now any pattern of use that would be benefited by dividing the band. A channelization plan might be needed in a very limited area with multiple users and can be developed in these cases during the coordination process.

7. AFTRCC agrees that the allocation is needed and foresees many different uses of this band. It specifically commented on the technical standards for equipment, the coordination of assignments and the use of fixed relay links. With regard to coordination, all applications for use of this band will be coordinated on a case-by-case basis with Government users through the usual FCC/IRAC procedures. Technical standards to apply to this band are discussed below. In so far as fixed relay links are concerned, such usage will be permissible only in conjunction with telemetry and telecommand operations authorized in the band. Use of this band for general point-to-point data communications of the type normally carried out in the fixed service will not be authorized.

8. Similar to the provision adopted for the band 216–220 MHz (see Report and Order, Docket No. 18924, 36 FR 9514) no technical stand-

ards are being adopted herein except for frequency tolerances which are taken from the international Radio Regulations and for those standards which are presently in the FCC Rules. Power and authorized bandwidth limitations will be specified in the station authorizations for telemetry in this band on a case-by-case basis. Transmitters will not be subject to the requirement for type acceptance.

9. In view of the foregoing it appears that the public interest can be served by adopting the Rules amendments set forth in the Appendix. Accordingly, IT IS ORDERED, That pursuant to authority contained in Section 303 (c), (e) and (f) of the Communications Act of 1934, as amended, Part 2, Section 2.106 and Parts 89, 91 and 93 of the Commission's Rules and Regulations are amended effective August 31, 1973. IT IS FURTHER ORDERED, That this proceeding is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§ 2.106 [Amended]

In § 2.106, the Table of Frequency Allocations is amended as follows and footnote US60 is deleted from the list of footnotes:

U.S. Federal Communications Commission

Band (MHz)	Allocation	Band (MHz)	Service	Class of station	Nature of services
5	6	7	8	9	10 11
*	*	*	*	*	* *
1427–1429	G, NG	1427–1429	Space Operation (telecommand). Fixed (telemetering). Land mobile (Telemetering and telecommand).	Base Earth Fixed Land mobile	Industrial. Land transportation. Public safety. Earth (telecommand). Base (telecommand). Fixed (telemetering). Land mobile (telemetering).
1429–1435	G, NG	1429–1435	Fixed (Telemetering). Land mobile (Tele-(metering and telecommand).	Base Fixed Land mobile	Industrial. Land transportation. Public safety. Base (telecommand). Fixed (telemetering). Land mobile (telemetering).
*	*	*	*	*	* *

II. Part 89 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. In § 89.101, the table of frequencies in paragraph (h) is amended by adding the frequency band 1427–1435 MHz in numerical order, and adding limitation (20) to paragraph (i) to read as follows:

§ 89.101 Frequencies.

* * * * * * *

(h) * * *

Frequency band—MHz	Class of Station(s)	Limitations
952–960	Operational fixed	5, 6
1427–1435	Base, mobile, and operational fixed	20
1850–1990	Operational fixed	6

* * * * * * *

* * * * * * *

(i) * * *

(20) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

* * * * * * *

2. In Section 89.103, paragraph (a) is amended to include the band 1427–1435 MHz in numerical sequence in the table and add a new footnote 5 applicable to the band to read as follows:

§ 89.103 Frequency stability.

(a) * * *

Frequency range	All fixed and base stations	All mobile stations	
		Over 3 watts	3 watts or less
MHz	*Percent*	*Percent*	*Percent*
470 to 512	0.00025	0.0005	0.0005
950 to 1427	(2)	(2)	(2)
1427 to 1435	[5].03	.03	.03
Above 1435	(2)	(2)	(2)

* * * * * * *

[5] For fixed stations with power above 200 watts, the frequency tolerance is 0.01 percent if the necessary bandwidth of the emission does not exceed 3 kHz. For fixed station transmitters with a power of 200 watts or less and using time division multiplex, the frequency tolerance may be increased to 0.05 percent.

* * * * * * *

3. In § 89.117, paragraphs (a) and (b) are amended to read as follows:

§ 89.117 Acceptability of transmitters for licensing.

(a) Periodically, the Commission publishes a list of equipment entitled "Radio Equipment List, Equipment Acceptable for Licensing." Copies of this list are available for public reference at the Commission's offices in Washington, D.C., and at each of its field offices. This list includes type accepted and type approved equipment and, also until such time as it may be removed by Commission action, other equipment which appeared in this list on May 16, 1955.

(b) Except for transmitting equipment used in developmental stations, transmitting equipment authorized as of January 1, 1965, in police zone and interzone stations, transmitting equipment in radiolocation stations during the term of any license issued prior to January 1, 1973, and transmitting equipment used in the band 1427–1435 MHz, all radio transmitting equipment utilized by a station authorized for operation under this part must be types included in the Commission's current "Radio Equipment List" and designated for use under this part

or be types which are type accepted by the Commission for use under this part.

* * * * * * *

III. Part 91 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. In Section 91.102, paragraph (a) is amended to include the band 1427–1435 MHz in numerical sequence in the table and add a new footnote 6 applicable to the band to read as follows:

§ 91.102 Frequency stability.

(a) * * *

Frequency range	Transmitter (input) power			
	Fixed and base stations		Mobile stations	
	Over 300 watts	300 watts or less	Over 3 watts	3 watts or less
MHz	*Percent*	*Percent*	*Percent*	*Percent*
470 to 512	0.00025	0.00025	0.0005	0.0005
950 to 1427	(4)	(4)	(4)	(4)
1427 to 1435	[6].03	[6].03	.03	.03
Above 1435	(4)	(4)	(4)	(4)

* * * * * * *

[6] For fixed stations with power above 200 watts, the frequency tolerance is 0.01 percent if the necessary bandwidth of the emission does not exceed 3 kHz. For fixed station transmitters with a power of 200 watts or less and using time division multiplex the frequency tolerance may be increased to 0.05 percent.

* * * * * * *

2. In § 91.109, paragraph (b) is amended to read as follows:

§ 91.109 Acceptability of transmitters for licensing.

* * * * * * *

(b) Except for transmitting equipment used in developmental stations, transmitting equipment authorized in the Industrial Radiolocation Service (see § 91.603) and transmitting equipment used in the band 1427–1435 MHz, all radio transmitting equipment (including signal boosters) utilized by stations authorized for operation under this part must be types included in the Commission's current "Radio Equipment List" and designated for use under this part or be types which are type accepted by the Commission for use under this part.

* * * * * * *

3. In § 91.254 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (35) to paragraph (b), to read as follows:

§ 91.254 Frequencies available.

(a) * * *

Power Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* *
Frequency band:		
1427–1435	Base, mobile, & operational fixed	35
1850–1990	Operational fixed	
* * *	* * *	* *

(b) * * *

(35) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation

is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

4. In § 91.304 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (37) to paragraph (b), to read as follows:

§ 91.304 Frequencies available.

(a) * * *

Petroleum Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* * *
Frequency band:		
1427–1435	Base, mobile, and operational fixed	37
1850–1990	Operational fixed	
* * *	* * *	* * *

(b) * * *

(37) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

5. In § 91.354 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (35) to paragraph (b), to read as follows:

§ 91.354 Frequencies available.

(a) * * *

Forest Products Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* * *
Frequency band:		
1427–1435	Base, mobile, and operational fixed	35
1850–1990	Operational fixed	
* * *	* * *	* * *

(b) * * *

(35) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject

or be types which are type accepted by the Commission for use under this part.

* * * * * * *

III. Part 91 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. In Section 91.102, paragraph (a) is amended to include the band 1427–1435 MHz in numerical sequence in the table and add a new footnote 6 applicable to the band to read as follows:

§ 91.102 Frequency stability.

(a) * * *

Frequency range	Transmitter (input) power			
	Fixed and base stations		Mobile stations	
	Over 300 watts	300 watts or less	Over 3 watts	3 watts or less
MHz	*Percent*	*Percent*	*Percent*	*Percent*
470 to 512	0.00025	0.00025	0.0005	0.0005
950 to 1427	(4)	(4)	(4)	(4)
1427 to 1435	[6].03	[6].03	.03	.03
Above 1435	(4)	(4)	(4)	(4)

* * * * * * *

[6] For fixed stations with power above 200 watts, the frequency tolerance is 0.01 percent if the necessary bandwidth of the emission does not exceed 3 kHz. For fixed station transmitters with a power of 200 watts or less and using time division multiplex the frequency tolerance may be increased to 0.05 percent.

* * * * * * *

2. In § 91.109, paragraph (b) is amended to read as follows:

§ 91.109 Acceptability of transmitters for licensing.

* * * * * * *

(b) Except for transmitting equipment used in developmental stations, transmitting equipment authorized in the Industrial Radiolocation Service (see § 91.603) and transmitting equipment used in the band 1427–1435 MHz, all radio transmitting equipment (including signal boosters) utilized by stations authorized for operation under this part must be types included in the Commission's current "Radio Equipment List" and designated for use under this part or be types which are type accepted by the Commission for use under this part.

* * * * * * *

3. In § 91.254 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (35) to paragraph (b), to read as follows:

§ 91.254 Frequencies available.

(a) * * *

Power Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* *
Frequency band:		
1427–1435	Base, mobile, & operational fixed	35
1850–1990	Operational fixed	
* * *	* * *	* *

(b) * * *

(35) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation

is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

4. In § 91.304 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (37) to paragraph (b), to read as follows:

§ 91.304 Frequencies available.

(a) * * *

Petroleum Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* * *
Frequency band:		
1427–1435	Base, mobile, and operational fixed	37
1850–1990	Operational fixed	
* * *	* * *	* * *

(b) * * *

(37) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

5. In § 91.354 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (35) to paragraph (b), to read as follows:

§ 91.354 Frequencies available.

(a) * * *

Forest Products Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* * *
Frequency band:		
1427–1435	Base, mobile, and operational fixed	35
1850–1990	Operational fixed	
* * *	* * *	* * *

(b) * * *

(35) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject

to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

6. In Section 91.404 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (12) to paragraph (b) to read as follows:

§ 91.404 Frequencies available.

(a) * * *

Motion Picture Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* *
Frequency band:		
1427–1435	Base, mobile, and operational fixed	12
1850–1990	Operational fixed	
* * *	* * *	* *

(b) * * *

(12) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

7. In Section 91.454 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (13) to paragraph (b) to read as follows:

§ 91.454 Frequencies available.

(a) * * *

Relay Press Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* *
Frequency band:		
1427–1435	Base, mobile and operational fixed	13
1850–1990	Operational fixed	
* * *	* * *	* *

(b) * * *

(13) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of

the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

8. In Section 91.504 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (35) to paragraph (b) to read as follows:

§ 91.504 Frequencies available.

(a) * * *

Special Industrial Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	* * *
Frequency band:		
1427–1435	Base, mobile, and operational fixed	35
1850–1990	Operational fixed	
* * *	* * *	* * *

(b) * * *

(35) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this station shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

* * * * * * *

9. In Section 91.554 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (48) to paragraph (b) to read as follows:

§ 91.554 Frequencies available.

(a) * * *

Business Radio Service Frequency Table

Frequency or band	Class of station(s)	General reference	Limitations
MHz			
* * *	* * *	* * *	* * *
Frequency band:			
1427–1435	Base, mobile, and operational fixed	Telemetry	48
2150–2160	Operational fixed	Radio alarm	22
* * *	* * *	* * *	* * *

(b) * * *

(48) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any,

of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

* * * * * * *

10. In Section 91.730 the table of frequencies in paragraph (a) is amended by adding limitation (22) to paragraph (b) to read as follows:

§ 91.730 Frequencies available.

(a) * * *

Manufacturers Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	*
Frequency band:		
1427–1435	Base, mobile, and operational fixed	22
1850–1990	Operational fixed	
* * *	* * *	*

(b) * * *

(22) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

11. In Section 91.754 the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (18) to paragraph (b) to read as follows:

§ 91.754 Frequencies available.

(a) * * *

Telephone Maintenance Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
MHz		
* * *	* * *	*
Frequency band:		
1427–1435	Base, mobile and operational fixed	18
1850–1990	Operational fixed	
* * *	* * *	*

(b) * * *

(18) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base

stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

IV. Part 93 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. In Section 93.102, paragraph (a) is amended to include the band 1427–1435 MHz in numerical sequence in the table and add a new footnote 5 applicable to the band to read as follows:

§ 93.102 Frequency stability.

(a) * * *

Frequency range	All fixed and base stations	All mobile stations	
		Over 3 watts	3 watts or less
MHz	*Percent*	*Percent*	*Percent*
* * * *	*	*	*
470 to 512	.00025	.0005	.0005
950 to 1427	(3)	(3)	(3)
1427 to 1435	[5].03	.03	.03
Above 1435	(3)	(3)	(3)

* * * * * * *

[5] For fixed stations with power above 200 watts, the frequency tolerance is 0.01 percent if the necessary bandwidth of the emission does not exceed 3 kHz. For fixed station transmitters with a power of 200 watts or less and using time division multiplex the frequency tolerance may be increased to 0.05 percent.

* * * * * * *

2. In § 93.109, paragraphs (a) and (b) are amended to read as follows:

§ 93.109 Acceptability of transmitters for licensing.

(a) Periodically, the Commission published a list of equipment entitled "Radio Equipment List, Equipment Acceptable for Licensing." Copies of this list are available for public reference at the Commission's offices in Washington, D.C. and at each of its field offices. This list includes type accepted and type approved equipment and, also, until such time as it may be removed by Commission action, other equipment which appeared in this list on May 16, 1955.

(b) Except for transmitting equipment used in developmental stations, transmitting equipment used in radiolocation stations during the term of any license issued prior to January 1, 1973, and transmitting equipment used in the band 1427–1435 MHz, all radio transmitting equipment utilized by stations authorized for operation under this part must be types included in the Commission's current "Radio Equipment List" and designated as acceptable for use under this part or be types which are type accepted by the Commission for use under this part.

* * * * * * *

3. In Section 93.112, the table of frequencies in paragraph (a) is amended by adding the frequency band 1427–1435 MHz in numerical order and adding limitation (21) to paragraph (b) to read as follows:

§ 93.112 Availability of microwave frequencies.

(a) * * *

Frequency band—MHz	Class of station(s)	Limitations
952–960	Operational fixed	5,6
1427–1435	Base, mobile and operational fixed	21
1850–1990	Operational fixed	6
* * * * * * *		

(b) * * *

(21) Use of this band is for local area operational fixed and mobile station telemetering and associated base station telecommand purposes. All operation is

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secondary to Government radio services and the Space Operation (telecommand) service. Airborne devices will not be authorized. Assignments are subject to additional technical and operational limitations, and each application must include precise information concerning emission characteristics, transmitter frequency deviation, output power, type and directional characteristics, if any, of the antenna, and the minimum necessary hours of operation. Base stations authorized in this band shall be used only to perform telecommand functions in conjunction with associated mobile telemetering stations. When so authorized, such base stations may also command actions by the vehicle itself. Base stations will not be authorized solely to perform the latter function.

* * * * * * *

F.C.C. 73-719

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REQUEST FOR ISSUANCE OF TAX CERTIFICATE FOR SALE OF VIACOM INTERNATIONAL, INC., COMMON STOCK PURSUANT TO COMMISSION ORDER, BY E. K. MEADE, JR., NEW YORK, N.Y. ROBERT D. WOOD, GREENWICH, CONN.	File No. CTAX-13

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 11, 1973)

BY THE COMMISSION:

1. On April 6, 1973, E. K. Meade, Jr., and Robert D. Wood, filed with the Commission a joint application (CTAX-13) for tax certificates pursuant to Section 1071 of the Internal Revenue Code [1] with respect to the sale of their stock in Viacom International, Inc.

2. Viacom International is the result of a spin-off by Columbia Broadcasting System, Inc., (CBS) of its cable television and program syndication businesses in 1970 in order to comply with newly adopted Commission rules (1) prohibiting cross ownership, operation, control, or interest of a national television network and cable television systems [2] and (2) prohibiting certain syndication activities and non-network interests by television networks.[3] In June, 1971, the Commission found that the spin-off plan proposed by CBS would fully comply

[1] Section 1071 of the 1954 Internal Revenue Code provides:

If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. . . .

The term "radio broadcast stations" refers not only to AM, FM, and television broadcast stations, but was to cable television systems and television broadcast networks, both of which provide a mass communications service ancillary to broadcasting and hence are subject to Commission regulation. *J. A. W. Inglehart*, 38 FCC 2d 541, 542 (1972); *Cosmos Cablevision Corp.*, 33 FCC 2d 293, 295 (1972).

[2] Section 76.501 (formerly Section 74.1131) of the Commission's rules, adopted in June, 1970, *Second Report and Order in Docket 18397*, 23 FCC 2d 816, *reconsideration denied*, 39 FCC 2d 377 (1973), states in pertinent part:

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: (1) a national television network (such as ABC, CBS, NBC). . . .

[3] Section 73.658(j)(1)(i) provides in substance that no television network shall, after June 1, 1973, engage in "syndication" within the United States (*i.e.*, sell or license television programs to United States stations for non-network exhibition) or engage in such activity in foreign countries except as to programs of which it is the sole producer. Section 73.658(j)(1)(ii) prohibits, after August 1, 1972, television networks from acquiring any financial or proprietary interest, except the right to network exhibition, in television programs produced wholly or partly by any other person. These rules were adopted in May, 1970, 23 FCC 2d 382, *reconsideration denied*, 25 FCC 2d 318 (1970). The Commission's authority to adopt the rules was upheld by the United States Court of Appeals in *Mt. Mansfield Television, Inc.*, 442 F. 2d 470 (2d Cir. 1971).

with the rules "only if all CBS officers and directors, Broadcast Group division presidents, and any individual stockholder with one percent or more of CBS common stock, dispose of [Viacom] stock" within two years. *Columbia Picture Industries, Inc.*, 30 FCC 2d 9, 16 (Released June 4, 1971).

3. Mr. Meade, a Vice President of CBS, received 1,251 shares of Viacom stock in the spin-off distribution; Mr. Wood, President of CBS Television Network Division, received 1.096 shares of Viacom. Each filed an acceptance of the terms of the Commission's Order on June 4, 1971. Mr. Meade represents to the Commission that he sold his shares of Viacom on the open market on March 7, 1972; Mr. Wood states that he sold his shares on the open market on May 2, 1972.

4. In December, 1972, the Commission dealt with a similar request for a tax certificate from a member of the CBS Board of Directors. *J. A. W. Inglehart*, 38 FCC 2d 541 (1972). There the Commission held that the applicant would be eligible for a tax certificate when he actually sold his Viacom shares; however, the Commission ordered the application held in abeyance since the applicant had not sold or exchanged his Viacom shares. *Id.* at 542.

5. On the basis of the foregoing, including Messrs. Wood and Meade's assertions that they sold on the open market the Viacom stock they received in the spin-off distribution, we find that the sales by Wood and Meade of their shares of Viacom were "necessary or appropriate to effectuate a change in policy or the adoption of a new policy" by this Commission.

Accordingly, IT IS ORDERED, That the above-captioned joint application for issuance of Tax Certificates (CTAX–13) filed by E. K. Meade, Jr., and Robert D. Wood, IS GRANTED, and the tax certificates appended hereto will BE ISSUED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-615

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Request by
VISION CABLE COMMUNICATIONS, INC.
For Extension of Time To File Petition
To Deny

JUNE 6, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

LEE M. MITCHELL,
Attorney at Law, Sidley & Austin, 1156 Fifteenth Street NW., Washington, D.C.

DEAR MR. MITCHELL: This is in reference to your requests on behalf of Vision Cable Communications, Inc. (Vision), whereby you seek an extension of time to file a petition to deny the license renewal application for Station KLNI-TV, Lafayette, Louisiana. Southwestern Louisiana Communications, Incorporated, the licensee of Station KLNI-TV, has not objected to the requested extension of time.

Section 1.580(i) of the Commission's rules provides, in substance, that a petition to deny a license renewal application must be filed on or before the first day of the last full month of the station's license term. The license for Station KLNI-TV expires on June 1, 1973. Accordingly, a timely petition to deny was due on May 1, 1973. Absent good cause shown, the Commission will not grant a waiver of Rule 1.580(i) to authorize the filing of a petition after that date. See, *e.g., WSM Incorporated*, 24 FCC 2d 561 (1970) and *Trumbull County N.A.A.C.P.*, 25 FCC 2d 827 (1970).

In support of your request for an extension of time, you note that the licensee did not submit with its application a current balance sheet, as required by Section I of FCC Form 303. You further state that Vision "intends to bring to the Commission's attention certain serious inadequacies in Southwestern's performance which . . . may have been caused by insufficient financial resources and which the licensee may be unable to remedy because of a precarious financial position." According to your letter, Vision cannot present its arguments for denial of the KLNI-TV application without access to the required financial information. Therefore, you urge the Commission to extend the time for filing a petition to deny until June 15, 1973, or until two weeks after Southwestern Louisiana Communications, Incorporated, submits its current balance sheet. On June 4, 1973, the licensee amended the KLNI-TV application to include the omitted balance sheet.

In view of the foregoing uncontroverted allegations, we believe that you have demonstrated good cause for waiver of Section 1.580

(i) of our rules. Accordingly, the time for filing a petition to deny by Vision Cable Communications, Inc. against Station KLNI–TV, Lafayette, Louisiana, is extended to and including June 21, 1973.

Commissioner Robert E. Lee absent.

By Direction of the Commission.
Ben F. Waple, *Secretary.*

F.C.C. 73R-258

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VOGEL-ELLINGTON CORP. (WHOD), JACKSON, ALA. For Construction Permit	Docket No. 18897 File No. BP-17867

APPEARANCES

Jason L. Shrinsky, on behalf of Vogel-Ellington Corporation (WHOD); and *Thomas B. Fitzpatrick* and *Michael T. Fitch*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 11, 1973; Released July 17, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK WITH BOARD MEMBER KESSLER CONCURRING IN THE RESULT WITH A SEPARATE STATEMENT

1. This case is before the Review Board on the Broadcast Bureau's exceptions to the Initial Decision, released February 8, 1972, of Administrative Law Judge David I. Kraushaar proposing to grant the application. A complete statement of the background of the proceeding is contained in the Initial Decision. The Board has reviewed the Initial Decision in light of the Bureau's exceptions, the arguments of the parties and our examination of the record. Oral argument was heard by a panel of the Review Board on May 22, 1973. We agree with the Presiding Judge's ultimate resolution of the issues designated against Vogel-Ellington and with his recommendation to grant the application for a construction permit authorizing it to change the facilities of Station WHOD, Jackson, Alabama;[1] however, there are some areas in which we differ with the Presiding Judge's reasoning under the failure to disclose issue and the trafficking issues. Except as modified herein and in the rulings on the Bureau's exceptions contained in the attached Appendix, the Presiding Judge's findings of fact and conclusions of law are adopted.

2. The trafficking issue requires our first consideration. In its exceptions and brief, the Bureau argues that the Presiding Judge has not correctly evaluated all of the facts in the record and considered them properly in light of accepted precedent and trafficking policy. The principal factors suggesting trafficking, according to the Bureau, are: (1) the time the stations were held by the licensee; (2) the profits on the sales of the stations; and (3) the financial involvement (*i.e.*,

[1] After the Initial Decision was issued, the proposed assignment of WMAF Radio was dismissed by the Board's Order, FCC 72R-256, released September 20, 1972, the contract for assignment having expired.

degrees of investment to improve stations' service) of the licensee. Applying these factors to Vogel's purchases and sales of radio stations, the Bureau relies on the following factual assertions which, it contends, suggest that Vogel engaged in trafficking: (1) the holding period for the stations ranged from as little as 10 months to five and one-half years; (2) the price received from the assignment/sale of the stations ranged from a $16,000 loss to a price six times greater than the original costs of construction; and (3) contrary to Vogel's testimonial representation, annual financial reports do not disclose any additional investment in plant and equipment of significance with regard to any of these stations. On the last point, the Bureau contends that according to Vogel's testimony (Tr. 135–151) it was his practice to buy "dog" stations and build them up; however, the Bureau argues the facts show no significant investment in new or renovated plant and equipment. This, the Bureau urges, shows an intention by Vogel to sell the station at a profit rather than to operate the stations in the public interest.

3. To assist in evaluating these arguments, we shall look at Vogel's record with regard to each of the five stations in question in light of the criteria relied on by the Bureau. KLOV was held 5 years and 5 months.[2] No adverse inferences can be drawn simply from the length of time Vogel held this station. Although it could be argued that Vogel realized a profit of $42,000 from the sale of KLOV if only the difference between purchase and sales price is taken into account, such a limited approach is not justified by the record. Vogel spent $20,000 or more on new equipment, fixtures and furniture, for he had to substantially rebuild and rehabilitate the station. While the Bureau argues that this, and similar expenditures for other stations, cannot be credited because it was not clearly reflected in KLOV's financial reports, Vogel's testimony was not refuted or seriously challenged on cross-examination. Moreover, there was not evidence introduced to establish that the improvements were not made, as alleged. Under these circumstances, we agree with the Judge that it deserves credence. Moreover, the somewhat limited financial data in the record indicates that KLOV was not a very profitable station, and during the last full year of Vogel's ownership, it suffered a loss of nearly $2,000. Finally, the terms of Vogel's sale of the station are not indicative, on their face, of trafficking, for at settlement Vogel was to receive $19,600 with the balance to be paid over a period of eight years in equal monthly installments.

4. KVRH was retained by Vogel for a very short time, ten months, and it was sold for $27,500 more than the purchase price. Although the purchase price was $10,000 Vogel also invested in excess of $10,000[3] on the station for new equipment, repair of equipment and other improvements. During this short period, the station lost over $10,000. Although Vogel's stated reasons given at various times for the sale of the station differed, he indicated at the hearing that, despite his efforts, it was still a losing proposition. Once again, Vogel received a

[2] Under Section 1.597 of the Commission's Rules the assignment of a station held less than three years is subject to being designated for hearing, but the rule did not go into effect until March, 1962, after KLOV, KVRH and WMMT had been sold by Vogel.

[3] The financial data in the record shows $20,000 as the total cost of the station.

relatively small down payment of $8,000, and the balance was scheduled for monthly payments over a 10-year period.

5. Vogel retained Station WMMT for two years and five months; he sold the station for a stated price of $10,000 above what he paid for it. In 1961, the last full year of Vogel's ownership, a loss of nearly $6,000 was registered, and the cost data in the record indicates an expenditure of at least $7,000 for improvements during this period. A new transmitter was purchased and installed.[4] Again, after receiving a down payment of $20,000, Vogel was to receive the balance of the purchase price over a period of eight years.

6. Vogel built Station KWRV and operated the station for 4½ years before selling it for $75,000 more than construction costs to a company in which Vogel's manager of that station was president. Although a construction cost of $16,000 was used by the Presiding Judge and the parties, based on the station's financial report for 1961, considerably more than that was spent. Vogel estimated the total as being between $25,000 and $30,000, and this is corroborated by the financial report of 1966, which shows the total cost to be about $39,000. During the years that Vogel owned KWRV, operating losses were experienced in each year except 1966, the year of assignment, and these losses totalled over $21,000. At the time of assignment, Vogel received $10,000 cash and $6,000 in shares of Regional Broadcasting Corporation, Vogel's company, then held by the station manager who was the prospective president of the assignee. The balance of the purchase price was spread over eight years to be paid in monthly installments.

7. The last station in the group under consideration, KLIX, was retained by Vogel for three years and five months. It was sold for $16,000 less than the purchase price, and during the time Vogel owned it operating losses in excess of $75,000 were experienced.

8. The Board does not perceive an intent to traffick from the foregoing facts. Although we agree with the Bureau that the Judge's reliance upon his Initial Decision in *City of Camden*, 18 FCC 2d 427 (1969), was misplaced, it is also our view that even a cursory comparison of the instant matter with *Edina Corp.*, 4 FCC 2d 36, 7 RR 2d 767 (1963), the case principally relied on by the Bureau, will demonstrate that the similarities between the two are superficial rather than basic. The Board's perusal of the record convinces it that most of the difficulties in evaluating the charges of trafficking stem from the fact that Vogel has been somewhat less than careful in preparing his applications and financial reports to the Commission and in his responses to Commission inquiries, and this will be treated in greater detail subsequently.

9. The Bureau takes the position that Vogel realized profits of sufficient volume to be indicative of trafficking, but to reach this conclusion it rejects Vogel's testimony at the hearing that he spent substantial sums improving the station facilities. If the expenditure of these sums did take place, the profits Vogel supposedly received would be substantially reduced. The Bureau insists that Vogel's testimony cannot be

[4] Vogel's testimony to this effect is corroborated by the assignment contract which shows the purchaser assuming Vogel's obligation under a Gates Radio Company contract of February 16, 1961.

accepted because the amounts allegedly spent on improvements aren't reflected in the financial reports submitted by the stations while Vogel owned them. As already noted, the Bureau is not correct on this point. Moreover, the Judge believed Vogel,[5] and we think that there are sufficient corroborating facts outside Vogel's testimony to warrant acceptance of his statements. Thus, while the purchase price of KVRH was $10,000, the financial report for 1959 lists the total cost of the station as $20,000, substantiating Vogel's assertion that he invested in excess of $20,000 on the station. Vogel testified that he improved WMMT, in part by purchasing and installing a new transmitter, and the financial reports show that in 1961 during his ownership, the total cost of the station increased by approximately $7,000. Additionally, as previously indicated, the assignment contract lists as one of the assignee's obligations the assumption of Vogel's obligation under a Gates Radio Company contract of February 16, 1961. As to KWRV, Vogel's testimony that the cost of construction was $25,000 to $30,000, despite the 1962–65 financial reports showing approximately $16,000 for the total cost of property devoted to broadcasting, gets some support from the fact that the report for 1966, the last year in which Vogel had an ownership interest in the station, showed the total cost as being $39,129. For the foregoing reasons, the Board believes that Vogel's testimony concerning improvements can and should be accepted. Taking this evidence into account, and also the financial results of station operation under Vogel's ownership showing losses, in some cases rather substantial ones, the Bureau's contention that trafficking is indicated by profits realized by Vogel from the sale of stations does not stand up. The only possible exception to this is KWRV, but it must be noted that Vogel built this station and operated it for 4½ years before selling it to a new company in which his ex-station manager was president. Even this very sizeable profit can be discounted somewhat when account is taken of a history of operating losses totalling over $21,000.

10. As to the length of time Vogel kept the stations, only two were owned such a short time that a question as to an intent to traffick might be raised. These were KVRH and WMMT. On the other hand, Vogel continued his ownership of KLIX for nearly 3½ years even though there were operating losses in each of the three full years Vogel owned the station and these exceeded $75,000 in the aggregate. As we already stated, no inferences of trafficking can be found from the five years five months ownership of KLOV, and we believe the same to be true of KWRV (4½ years) and KLIX (3 years, 5 months).

11. The Broadcast Bureau characterizes Vogel's various explanations of the reasons for selling stations as evidence of a willingness to mislead and deceive the Commission, and since this is a serious charge, the Board has reviewed carefully the evidence upon which the Bureau relies, especially the answers Vogel gave on cross-examination at the hearing. Reading this testimony as a whole and attempting, as best it can on the basis of a cold written record, to fairly evaluate what Vogel was saying, the Board finds itself ultimately agreeing with the Judge.

[5] See paragraph 99 of the Initial Decision in which the Judge made demeanor findings on which he based his conclusion that Vogel testified truthfully.

To find Vogel's character seriously in default because of the way in which he responded to inquiries about the reasons for the transfer of the stations, it would be necessary to be persuaded that he was intentionally trying to mislead or deceive the Commission, and this simply is not reflected in the record. Certainly and clearly, Vogel's answers were at times incomplete and some inconsistencies became apparent, but for the most part, Vogel's later explanations were extensions and amplifications of answers given to the Commission earlier. The Board cannot fault Vogel for the cryptic reason he frequently gave for selling a station, *i.e.*, that he was selling to consummate a sales contract. Although such an answer seems inadequate on its face, it was never questioned; Vogel therefore had some reason for believing it was acceptable to the Commission. From reading Vogel's testimony no aura of evasiveness can be detected. It is not unreasonable that Vogel had more than a single reason for selling some of his stations, and considering the fact that he was not represented by counsel during the accomplishment of these transactions, to accept the Bureau's analysis would, in our view, be unduly harsh. In short, the Board concludes that this aspect of the case against Vogel for trafficking does not stand up.

12. As already noted, the Bureau argues that if the facts in the instant matter had been analyzed as they were in *Edina*, *supra*, a different result would have been reached. While the Board agrees that some aspects of the trafficking question warrant a more careful evaluation than they received in the Initial Decision, we are also of the opinion, as mentioned earlier, that there are only superficial similarities between the two cases. Just to illustrate the magnitude of the differences between the two cases, the Tedescos, in *Edina*, in a single transaction, earned a profit of $405,000, an amount almost three times greater than the profits Vogel realized from all his transactions ($139,000) before taking investments for improvements and operating losses into consideration. While this difference is not decisive, of course, the other dissimilarities between the cases are. In *Edina*, there was an admission of trafficking on the record, frequency manipulations, and intentional misrepresentation woven through the whole of the evidence under the trafficking issue.[6] A study of the various cases cited to us makes it perfectly evident that where there has been no admission of trafficking, the only way to answer the question of whether there has been trafficking is thorough and careful analysis of the facts, for the crucial question is one of intent and the elements may be indicative of such intent do not, of themselves, constitute trafficking. None of the cases relied on by the Bureau or by Vogel had facts sufficiently similar to those now before the Board to make them controlling, one way or the other. Therefore, based on our careful study of the evidentiary facts in this proceeding, the Board concludes that Vogel has not trafficked in broadcast authorizations.

FAILURE TO DISCLOSE

13. This issue was designated by the Commission because of Vogel's apparent failure to disclose his past broadcast interests in eight assign-

[6] See also the Board's discussion of *Edina* in *WHUT Broadcasting Company, Inc.*, 20 FCC 2d 1097, 18 RR 2d 1 (1969).

ment applications (FCC Form 314) and three applications for construction permits (FCC Form 301). It is undisputed that Vogel failed to disclose his past broadcast interests in response to Question 19, Section II, page 5, in FCC Form 314 and in a similar question in FCC Form 301. Question 19 asks:

> 19. Does applicant or any party to this application have now, or *has applicant or any such party had*, any interest in, or connection with the following:
> (a) Any standard, FM or television broadcast station?
> (b) Any application pending before the Commission?
> (c) Any application which has been denied by the Federal Communications Commission?
> (d) Any broadcast station the license of which has been revoked? [Emphasis added.]

The Judge accepted Vogel's testimony that he "simply did not understand the question to require a history of past broadcast interests," and therefore he did not list these interests in any of the applications he filed with the Commission. Vogel also did not list all the information called for in Section II, Table II (FCC Form 314), which requires the applicant to list businesses or occupations he has engaged in during the past five years and also any enterprise in which the applicant has or had within the past five years a 25 percent or greater interest or an official relationship in at least two assignment applications. It also appears that Vogel failed to indicate in at least three applications his connection with the dismissal of construction permits for Clarinda, Iowa, and Laramie, Wyoming, which must be disclosed under Question 7(c), FCC Form 314.

14. The Board does not subscribe to the Judge's reasoning that, because the Commission's staff, as revealed by the record, was aware of Vogel's past broadcast interests and could have easily ascertained the data with the "flick of a finger" on the Commission's computer, Vogel's failure to disclose these interests can simply be dismissed as relatively unimportant. The issue was not designated by the Commission to determine what Vogel's past broadcast interests were but rather why he failed to disclose them. The Commission is always concerned when an applicant or licensee fails to submit required information. See *Capital City Communications, Inc.*, 37 FCC 2d 164, 25 RR 2d 322 (1972); and *Fred Kaysbier*, 34 FCC 2d 788, 20 RR 2d 844 (1970). In *Folkways Broadcasting Co., Inc.*, 27 FCC 2d 614, 21 RR 2d 158 (1971), the Board rejected the argument advanced in opposition to a request for a Rule 1.65 issue that the information was already on file with the Commission in other application forms and ownership reports and, therefore, was not required to be repeated in subsequent filings. It was there stated that the burden is on the applicant to keep its application current and to thereby comply with the Commission's Rules and Regulations. Commission Rule 1.514(a) requires the applicant to "include all information called for by the particular form". Clearly, Vogel did not comply with this Commission Rule.

15. The circumstances in which these omissions occurred suggest, however, that the offenses are not serious enough to warrant a conclusion that Vogel lacks the necessary qualifications to be a Commission licensee. Vogel testified that he misread or misinterpreted the questions calling for the listing of past broadcast interests, and there is no evidence directly disputing his statements. The Judge, who observed

him while he was testifying, believed him. While the Bureau contends that Vogel had a motive for concealment in his trafficking activities, the Board finds it significant that Vogel failed to properly answer the questions regarding his past broadcast interests in all of his applications, including his first assignment application; clearly at that time, full disclosure would not have raised a question of trafficking and no motive for concealment was present. Moreover, Vogel had reported these interests when he owned the stations or permits so that the most cursory examination of Vogel's assignment files would have revealed what his interests had been. For example, when Vogel filed his application to acquire Station WMMT, he reported his then ownership of KVRH, but 3½ months later, when he filed an application to obtain WGNS, he omitted reference to KVRH which had been sold on September 23, 1959. It defies reason to conclude that Vogel, under these and similar circumstances, was attempting to conceal this information from the Commission in an effort to hide his supposed trafficking activities. Under these circumstances and the additional fact that in only one of the transactions was Vogel represented or aided by legal counsel, the Board cannot reach the conclusion that the failure to report was motivated by an intent to conceal. As soon as the need to report the past ownership data was called to Vogel's attention, he made a complete report of the matters, and the record is devoid of any evidence that Vogel was evasive in his responses.

16. To summarize, the foregoing analysis points to a conclusion that Vogel's derelictions in filling out his applications over a period of years do not warrant a conclusion that he lacks the necessary qualifications to be a Commission licensee. The Board does not intend this disposition to be interpreted as a minimization of the importance of filing complete information in applications submitted to the Commission, and were this a comparative matter, Vogel would be subjected to a substantial demerit for his failures. Yet, to go beyond this and hold him disqualified would be an unduly harsh result in light of the circumstances to which we have referred. *Cf. Glenn West*, FCC 73–688, —— FCC 2d ——; *Gross Broadcasting Company*, FCC 73–684, —— FCC 2d ——.

17. Accordingly, IT IS ORDERED, That the application (File No. BP–17867) of Vogel-Ellington Corporation (WHOD), for a construction permit authorizing it to change the facilities of standard broadcast Station WHOD at Jackson, Alabama, from operation as a Class III station on the frequency 1290 kHz with 1 kilowat power, daytime only, to unlimited time operation as a Class IV station on the frequency 1230 kHz with 1 kilowatt power daytime and 250 watts at night, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU

Exception No.	*Ruling*
1, 19, 30, 31, 32, 39, 51, 56.	Denied. The Presiding Judge's findings that nothing submitted at hearing challenges the veracity of Vogel's testimony or exhibits is supported by the record.
3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15.	Granted. The requested findings are supported by the record. We believe the Initial Decision should reflect the specific omissions made in each application Vogel filed with the Commission.
7, 20, 23, 24, 27, 29, 38, 40, 44, 48, 58.	Denied for the reasons set forth in this Decision.
2, 16, 18, 47, 49----	Denied as being without decisional significance.
17, 21, 26, 33, 37, 42, 46, 57.	Denied. With respect to the factual portions contained within the Bureau's exception, the Presiding Judge's findings accurately and adequately reflect the facts of record.
22, 25, 28, 34, 35, 36, 41, 43, 45, 50, 55.	Denied. Although not a significant factor in considering whether a licensee has engaged in trafficking, nonetheless, the manner in which the licensee has operated the stations in question and whether the licensee has been questioned by the Commission on the stations' operation may have bearing on the licensee's intent to engage in trafficking. See *WHUT Broadcasting Company, Inc.*, 20 FCC 2d 1097, 18 RR 2d 1 (1969).
52, 53----------	Granted to the extent indicated in this Decision.
54 ----------	Granted.

CONCURRING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

I concur in the result only of the Board's Decision. Except with respect to the Judge's erroneous reliance upon his Initial Decision in *City of Camden*, 18 FCC 2d 427, and to his personal remarks relating to "entrapment", I believe that the Judge's findings of fact under the failure to disclose and the trafficking issues to be substantially accurate and complete, and his conclusions persuasive and adequately supported by the findings. Hence, in my opinion, the Judge adequately dealt with the arguments raised in the Bureau's exceptions, and therefore, except as noted above, I would adopt the Judge's Initial Decision without the modifications contained in the majority's decision here. In short, I agree with the basic reasoning of the Initial Decision. Moreover, it is my view that the majority here in rejecting the Judge's reasoning relating to the failure to disclose issue (see para. 14 of the majority opinion), have taken the Judge's statement out of context. The thrust of para. 95 of the Initial Decision is directed to the Bureau's position that the applicant's failure to disclose his past broadcast interests constituted misrepresentation and concealment of the applicant's alleged trafficking activities; it is in this context that (a) the Judge made his observation objected to by the majority at para. 14 of their decision; and (b) I affirm the Judge's observation and disagree with the majority.

Stated another way, I find no basis for the majority position that the Judge either directly or by implication stated that Vogel's failure to disclose his past broadcast interests "can simply be dismissed as relatively unimportant."

F.C.C. 72D–9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
VOGEL-ELLINGTON CORP. (WHOD), JACKSON, ALA.	Docket No. 18897 File No. BP–17867
For Construction Permit	
WMAF RADIO, INC. (ASSIGNOR)	Docket No. 19299
and	File No. BAL–6992
VOGEL-MCCREERY CORP. (ASSIGNEE)	
For Assignment of License of Station WMAF, Madison, Fla.	

APPEARANCES

On behalf of applicants Vogel-Ellington Corporation (WHOD) and Vogel-McCreery Corporation (Assignee), Messrs. *Jason L. Shrinsky*, *James A. Koerner*, *B. Jay Baraff*, and *Arthur Stambler* (law offices of Arthur Stambler, Esq.); and on behalf of the Broadcast Bureau, Federal Communications Commission, Messrs. *Richard M. Riehl* and *Michael T. Fitch*.

INITIAL DECISION OF HEARING EXAMINER DAVID I. KRAUSHAAR

(Issued February 3, 1972; Released February 8, 1972)

PRELIMINARY STATEMENT

1. Vogel-Ellington Corporation (WHOD), the licensee of Standard Broadcast Station WHOD, Jackson, Alabama operates on the frequency 1290 kHz (Class III), with 1 kw power, daytime only. It has applied for a construction permit authorizing it to change frequencies to 1230 kHz (Class IV), and to operate with 250 watts nighttime and 1 kw daytime. This application was originally mutually exclusive with an application by Radio Jackson, Incorporated for a construction permit to construct and operate a new standard broadcast facility in Jackson, Alabama on the same frequency and with the same power as proposed by Vogel-Ellington. Consequently, the Commission consolidated the two applications and designated them for hearing by Order released July 9, 1970 (FCC 70–703). A prehearing conference was scheduled for August 18, 1970 and the hearing was originally scheduled to convene on September 21, 1970 (FCC 70M–945). However, due to the Examiner's illness at that time, the matter was continued subject to further Order of the Presiding Officer (Orders of the Chief Hearing Examiner, released August 27 and September 11, 1970, respectively, FCC 70M–1177 and FCC 70M–1247). In the meantime, due to the fact that there had been an outstanding *Suburban* issue against Radio Jackson, Inc., which had the effect of imposing a

"freeze" pending the Commission's adoption of its *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971), nothing was accomplished herein until April 16, 1971, when a prehearing conference was finally scheduled and convened, at which time the parties agreed, with the approval of the Presiding Officer, that the hearing would commence on October 5, 1971 (Order After Prehearing Conference, FCC 71M–597).

2. On June 29, 1971, meanwhile, the two applicants filed a joint petition, pursuant to Rule 1.525, for approval of an agreement under which the Radio Jackson, Incorporated application (File No. BP–17597) was to be dismissed in return for reimbursement of its reasonable out-of-pocket expenses. On approval of a portion of the reimbursement claimed, the joint petition was granted and Radio Jackson's application was dismissed with prejudice (FCC 71M–1245). However, in view of the fact that a petition for enlargement of the issues, asking for new issues against Vogel-Ellington, had been filed by the Commission's Broadcast Bureau, which was pending at the time of the Radio Jackson dismissal before the Review Board, the Examiner, at the request of the Broadcast Bureau, deferred ruling on Vogel-Ellington's application even though it was then in a posture to be granted. (See Order released July 30, 1971, FCC 71M–1245, *supra.*)

3. By Order adopted August 4, 1971, but not released until August 12th (FCC 71–824), the Commission rendered moot the pleadings that were then pending before the Review Board by consolidating Vogel-Ellington's application (File No. BP–17867) with an application by WMAF Radio, Inc. (Assignor) and Vogel-McCreery Corporation (Assignee) (File No. BAL–6992), for assignment of license of Standard Broadcast Station WMAF, Madison, Florida, and an application by Charles Banks (Assignor) and Vogel-Bolen Corporation (Assignee) (File No. BALH–1448), for assignment of license of Station WNON(FM), Lebanon, Indiana, and designating these applications for hearing in the present proceeding.[1] The Commission in its Order directed that the hearing "be expedited" (para. 7).[2] To the latter end, the Presiding Officer, by Order released August 17, 1971 (FCC 71M–1330), scheduled a prehearing conference for August 20 at 9:00 a.m., at which time it was determined, among other things, that the previously scheduled October 5 date was the earliest date practicable for convening the hearing (T.34–45). Subsequently, however, the parties indicated that they were negotiating a stipula-

[1] By Order released September 7, 1971 (FCC 71R–271), the Review Board dismissed as moot the petition for enlargement of the issues that the Commission's Broadcast Bureau had filed.

[2] Mr. Vogel, the applicants' principal, had asked the Commission that the Hearing Examiner be instructed "to expedite" the hearing and, pursuant to Section 409(a) of the Communications Act of 1934, as amended, to certify the record to the Commission. See Designation Order, para. 3. Pointing out that such a short cut under the statute is to be "employed only in the most exceptional circumstances", and that "We do not consider the circumstances of this case sufficient to warrant our invoking the requested exceptional procedure", the Commission rejected Mr. Vogel's request. Although the Commission went on to declare that statements of the applicants did persuade it "that some expeditious handling of this matter is in order", the hearing record, including especially the prehearing conference held August 20, 1971 (T. 25–48, Incl.), does not indicate that any more was ever involved herein than Mr. Vogel's qualifications in connection with his proposals to acquire the license of Standard Broadcast Station WMAF, Madison, Florida and to change the operating parameters of Standard Broadcast Station WHOD, Jackson, Alabama. There was, in short, nothing in the record to indicate that the "need" of the public for service would in any sense be jeopardized by affording this proceeding the "due deliberation" generally accorded applicants in Commission proceedings.

tion, which they represented to the Examiner would significantly shorten the time otherwise required to hear the case. Accordingly, the Examiner, by Order released September 23, 1971 (FCC 71M–1541), rescheduled the hearing until October 18, 1971. And, on the Examiner's own motion, the parties having orally consented, the hearing was once again postponed by Order released October 8 (FCC 71M–1619) to October 20. In the meantime, by Order released September 29, 1971 (FCC 71M–1561), the Examiner dismissed the application of Charles Banks (Assignor) and Vogel-Bolen Corporation (Assignee), *supra*, File No. BALH–1448, on petition by Mr. Banks alleging, *inter alia*, that the contract of sale for Station WNON(FM) had expired. The Examiner specified in his Order that granting such relief "will in no way affect the issues herein with respect to Mr. William R. Vogel's conduct".

4. The applicable issues, as finally framed by the Commission in this proceeding in its Order released July 9, 1970 (FCC 70–703, *supra*) and in its Order released August 12, 1971 (FCC 71–824), are hereby set forth as follows:

"2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station WHOD and the availability of other primary aural service (1 mv/m or greater in the case of FM) to such areas and populations.

"I. To determine the facts and circumstances surrounding William R. Vogel's failure to report:

(a) In applications to acquire stations:

1. WAMA, Selma, Ala.
2. WHOD, Jackson, Ala.
3. WBLO, Evergreen, Ala.
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his past broadcast interests.

(b) In the application to change facilities of Station WHOD, Jackson, Alabama, his past and current broadcast interests and his pending applications to acquire Stations WMAF, Madison, Florida, and WNON(FM), Lebanon, Indiana.

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"II. To determine whether William R. Vogel trafficked and is now trafficking in broadcast authorizations.

"III. To determine whether in view of the evidence adduced under the above issues whether William R. Vogel possesses the necessary qualifications to be a Commission licensee.

"IV. To determine whether grant of the above cited assignment applications will serve the public interest, convenience and necessity."

5. Hearing sessions were held herein on October 20, 21, and 28, 1971. During the session last cited counsel agreed that they needed until November 29 to prepare proposed findings of fact and conclusions of law, with the *caveat* from counsel for the Broadcast Bureau, however, that the Bureau would have to have its copies of the hearing transcript by no later than November 5th. Applicants' counsel recognized that he would not oppose a motion for extension of time by the Broadcast Bureau if the transcripts were not delivered by the November 5 deadline. Nevertheless, regardless of the Bureau's situation, he committed himself to file proposed findings by November 29 "no matter when we

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get the transcript" (T.239). It was also agreed that motions to correct the hearing transcripts would be filed by not later than November 19th (T.240). On October 28, 1971, the record was closed (T.243).

6. The transcripts of the October 20, 21, and 28 hearing sessions were not delivered by the Official Reporter until on or about November 16, some 10 or 11 days after the November 5 deadline, *supra*. Consequently, the Broadcast Bureau filed a request that the time for filing proposed findings be extended until December 21, 1971.[3] As the Presiding Officer had indicated previously (T.237, 238), it was incumbent on the applicant herein ("who desires expedition") to order prompt delivery of the hearing transcript and that he would do what he could to issue an early Initial Decision if he received "cooperation" from the parties. Since the Examiner's schedule would not permit him to work on the case between December 22nd and mid-January, however, he postponed the deadline for filing proposed findings to January 14, 1972. On the further unopposed motion of the Broadcast Bureau, during the Examiner's absence, the deadline for filing proposed findings was again extended by the Chief Hearing Examiner until January 21, 1972, when the Bureau filed a 62-page document. The parties have waived the opportunity to file replies to each other's filings.

FINDINGS OF FACT

Engineering Coverage (*Issue 2, supra*)

7. Vogel-Ellington Corporation proposes to change the facilities of Station WHOD at Jackson, Alabama from operation as a Class III station on 1290 kHz with 1 kilowatt power, daytime only, to an unlimited time operation as a Class IV station on 1230 kHz with 1 kilowatt power daytime and 250 watts at night.

8. Jackson, Alabama, population 5,957, is located in Clarke County, population 26,724, in the southwestern part of the state. It is not a part of any urbanized or standard metropolitan statistical area. In addition to the present operation of Station WHOD, Jackson has one other broadcast facility, namely, WHOD–FM (104.9 MHz, 3 kw, 297 ft., A), also operated by the applicant.

9. The existing antenna and ground system of Station WHOD would be used for the proposed operation. Because of change in frequency to one with less attenuation, the proposed operation would result in a daytime gain of WHOD service in all directions except in areas where it would receive co-channel objectionable interference on the new frequency from Station WHSY, Hattiesburg, Mississippi. At night, all of the proposed service represents a gain. Employing an effective field of 194 mv/m for the present operation and 192 mv/m for the proposed in conjunction with ground conductivity values for the area taken from Fig. M–3 of the Rules, the daytime gain and loss figures are as follows:

[3] The Bureau indicated its request for the extension to December 21st was predicated on the fact that the 10 or 11 day delay beyond November 5 in receiving the hearing transcripts affected its "already scheduled commitments".

	Population [4]	Area (sq. mi.)
Daytime gain*	2,352	112
Daytime loss*	984	34

*Occurs in rural areas only.
[4] Population data are derived from the 1970 U.S. Census.

10. One AM station (WBAM) provides primary service (0.5 mv/m or greater) to all of the gain area and three other AM stations serve portions. In addition, one FM station provides 1.0 mv/m service to a portion. There is in sum, a minimum of one and a maximum of five aural services available in the gain area. The area receiving one such service comprises 19 square miles with a population of 502; the area receiving two such services includes 611 persons in 38 square miles; and the area receiving three such services encompasses 302 persons in 12 square miles.

11. AM Station WBAM also provides primary service (0.5 mv/m or greater) to all of the loss area and three other AM stations serve portions so that from one to two aural services are available in the loss area. The area receiving one such service comprises 23 square miles with a population of 742; and the area receiving two such services encompasses 242 persons in 11 square miles.

The Special Issues Added by the Commission

12. Under the special issues, *supra*, para. 4, the history of Mr. William R. Vogel's broadcast holdings reflected in applications and other documents he filed with the Commission, over a period of some 15 years, was examined into. In regard to this, the Examiner has ascertained, after due deliberation and careful review, that it will probably conduce most to the orderly and expeditious resolution of the matters in controversy before him, if, wherever feasible, he were to adopt the Broadcast Bureau's somewhat tedious mode of exposition of the established facts as set forth in paragraphs 6 through 103 of its proposed findings, notwithstanding its prolixity and the repetition of essentially the same representations and/or omissions by Mr. Vogel in connection with several separate applications.[5] As the Bureau has observed (Bureau's Proposed Findings, para. 6), the portions of those applications which the Bureau deemed pertinent to the issues are encompassed in a joint stipulation of counsel identified in the record as Broadcast Bureau Ex. 1 (B/B Ex. 1), to which various items are appended as an attachment. The Examiner, for convenience, will also follow the Bureau's practice of referring to these items by number. For example, Item # 1 refers to Item # 1 of the attachment to Broadcast Ex. 1.

[5] That there will be no misunderstanding of what the Examiner has done, he has adopted the substance of the Broadcast Bureau's Proposed Findings of Fact, para. 6–102, subject to such editorial revisions as he deemed necessary in the interest of clarity and accuracy. In many instances, however, where the Bureau merely summarized evidence in the record with such descriptive prefixes as "Vogel noted" or "Vogel testified", the Examiner has substituted explicit factual findings. No purpose is served the Examiner believes, by summarizing testimony without indicating whether it is being accepted or rejected as the basis for a finding. In this respect, it may be observed here that Mr. Vogel's testimony was not impeached in any significant sense, the Examiner believes, by other evidence of record. For reasons that will appear, the Examiner rejects para. 118–128 of the Bureau's Proposed Findings, as well as para. 103.

13. Before proceeding with the history referred to above, however, it is to be noted, as a background observation, that Mr. William R. Vogel began his working career as a school teacher and that he had entered the radio field as a time salesman at Radio Station WJZM, Clarksville, Tennessee during June of the year 1951; that following sales positions at radio stations in Tennessee, Kentucky and Illinois, he had formed a partnership with one Monroe T. Smock to acquire Radio Station KLOV at Loveland, Colorado during June of 1956; and that this marked Mr. Vogel's initial entry into a broadcast ownership which now spans a period of approximately 15 years.

14. An application for consent to assignment of license for Station KLOV, Loveland, Colorado, from Loveland Broadcasters to Vogel & Smock partnership was filed with the Commission on June 19, 1956 (B/B Ex. 1, paragraph 1, Item # 1. The application reflected that the consideration for the assignment was $25,500.00. The reason given by Vogel & Smock for the requested acquisition was—

> Assignee requests approval of assignment to enable it to own and operate Radio Station KLOV in the public interest, serving particularly the City of Loveland, Colorado, and surrounding area.

15. Section II, Table II (p. 4) of the Commission's Form 314 (Application for Consent To Assignment of Radio Broadcast Station Construction Permit or License) required, and still requires, the proposed assignee to list each party to the application's principal businesses or occupations currently and during the past five years, and any enterprise in which the applicant has or had within the past five years a 25 percent or greater interest or any official relationship. In response to this inquiry in Item # 1 (the 1956 KLOV assignment application), Mr. Vogel told the Commission that he had been a salesman or sales manager at four radio stations and the owner of an insurance company during the period 1951 through 1956.

16. Question 19 (Section II, p. 5) of the Commission's Form 314 stated, and still states:

> Does applicant or any party to this application have now, or has applicant or any such party had, any interest in, or connection with, the following:
> (a) Any standard, FM, or television broadcast station?
> (b) Any application pending before the Commission?
> (c) Any application which has been denied by the Federal Communications Commission?
> (d) Any broadcast station the license of which has been revoked?

If the answer to any of the subsections of Question 19 is "yes", the applicant is required to state the nature of his interest or connection and the call letters of the station or file number of the application and the location. In response to Question 19 in Item #1, *supra*, Mr. Vogel correctly answered "yes" only to subsection (a), and he listed his positions with four radio stations.

17. The application (Item #1) informed the Commission that it was intended that Mr. Vogel would be general and sales manager of Station KLOV. The assignment was consented to by the Commission on July 18, 1956 (Item #2). In January 1958, the Vogel & Smock partnership added a five percent limited partner (Item #3). The addition was approved by the Commission in February 1958 (Item #4). Another alteration in the makeup of the licensee of KLOV was the

withdrawal of Smock and inclusion of two other individuals in a change from Vogel & Smock to the limited partnership, Loveland Broadcasters, in May 1958 (Item #5). This was approved by the Commission in May 1958 (Item #7).

18. During 1959, the license of Station KLOV was assigned from the limited partnership, Loveland Broadcasters, to the Regional Broadcasting Corporation (Regional), of which Vogel was an 80.5% shareholder (Item #9). The Commission duly approved this assignment (Item #10).

19. On November 24, 1961, Regional filed with the Commission an application for consent to assign the license of Station KLOV to Evergreen Enterprises, Inc. for a consideration of $68,000.00. Regional stated that the reason for the assignment was that—

> Due to the distance between McMinnville, Tenn. [Vogel's residence] and Loveland, Colorado, it is felt that it is not economically feasible to directly administrate [sic] the operation of KLOV. Therefore, we feel that the public interest could be better served by this assignment. (Item #11)

The Commission consented to this assignment on January 3, 1962 (Item #12).

20. On October 24, 1958, the Loveland Broadcasters partnership filed with the Commission an application for consent to acquire Station KVRH, Salida, Colorado (Item #13). The application reflected that the consideration for the assignment was $10,000.00. The reason given by the proposed assignee for the acquisition was:

> Purchasing of the assets of Heart of the Rockies Broadcasting Company, Inc. consisting of the radio station transmission facilities and tower site of Radio Station KVRH. (Item #13).

21. In Section II, Table II of Item #13, *supra*, Mr. Vogel listed only Station KLOV. In response to Question 19 he indicated that he did have or had had an interest in a broadcast station—KLOV—and that he had a 50 percent interest in an application that was then pending before the Commission for Laramie, Wyoming (Item #13).[6] The Commission granted its consent to the assignment of Station KVRH to Loveland on November 25, 1958 (Item #14). With the Commission's consent, the license of KVRH was subsequently reassigned from Loveland Broadcasters to Regional (Items #16 and 17).

22. On September 2, 1959, Regional filed with the Commission an application for its consent to assign Station KVRH to William J. Murphy for $37,500.00 consideration. The reason provided by Regional for the requested assignment was "To consummate sales contract." (Item #18). The Commission consented to the assignment on September 23, 1959 (Item #19).

23. On August 27, 1959, Regional filed with the Commission an application for Consent to acquire Station WMMT, McMinnville, Tennessee, for consideration of $82,500.00 (B/B Ex. 1, paragraph 20, Item #20). The reason stated by Regional for the assignment was the following:

> Regional Broadcasting Corporation requests this assignment in order to operate WMMT, in the public interest and serve McMinnville and the surrounding area in the various ways relative to broadcasting.

[6] A construction permit was granted to Laramie Broadcasters on November 11, 1960. The station was not built, and on August 14, 1961 the permit was assigned to Albany Broadcasters, Inc. for $400.00.

The application stated that Mr. Vogel would be general manager of the station upon acquisition (Item #20).

24. In the application for Commission consent to acquire Station WMMT, Mr. Vogel listed in Section II, Table II of FCC Form 314 his participation in Regional and two radio sales jobs he had between 1954 and 1956. In response to Question 19, Vogel indicated his then interests in KLOV and KVRH, a 100 percent interest in a pending application for McCook, Nebraska, and a 50 percent interest in a pending application for Laramie, Wyoming (Item #20).

25. The Commission consented to Regional's acquisition of Station WMMT on October 7, 1959 (Item #21).

26. A renewal of license application for Station WMMT filed May 5, 1961, indicated that there had been no change in the staffing of Station WMMT (B/B Ex. 1, paragraph 22, Item #22).

27. On December 4, 1961, Regional filed an application for Commission consent to assign the license for Station WMMT to the Ogram Broadcasting Corporation for a consideration of $92,500.00. Regional stated that the reason for the requested assignment was that the—

> Principal owner of assignor has received notice of resignation of the manager of another of assignor's station (WGNS) and desires to assume direct management of WGNS, moving his residence there and to be relieved of responsibility for WMMT. Assignor therefore feels that the public's best interests will be served by proposed assignment. (Item #23).

The Commission consented to the assignment of Station WMMT to Ogram on February 6, 1962 (Item #24).

28. Going backward, on December 3, 1959, Regional had filed with the Commission an application for Commission consent to acquire Station WGNS, Murfreesboro, Tennessee, for a consideration of $100,000.00 (B/B Ex. 1, paragraph 25, Item #25). The reason stated by Regional for the requested assignment was that

> Regional Broadcasting Corporation requests this assignment in order to operate WGNS, in the public interest and serve Murfreesboro and the surrounding area in the various ways relative to broadcasting.

In Section II, Table II of that application, Mr. Vogel had listed Regional and his two radio sales jobs subsequent between 1954 and 1956. In response to Question 19 of that application, he had listed his interests in Stations KLOV and WMMT, and in the pending applications for facilities in McCook, Nebraska, and Laramie, Wyoming. The application indicated that Vogel would become the general manager of Station WGNS upon acquisition (Item #25).

29. The Commission consented to Regional's acquisition of Station WGNS on February 10, 1960 (Item #26).

30. On December 17, 1969, Regional filed with the Commission an application for Commission consent to the assignment of the license of Station WGNS to the Vogel-Hale Corporation for a consideration of $300,001.00. Vogel-Hale Corporation included all the Regional stockholders, but it also included two new shareholders—Monte Hale with 32 percent of the stock and William R. Vogel, Jr. with two percent of the stock. Vogel, Sr.'s interest in the licensee declined slightly, from 65.7 percent of Regional to 62.9 percent of Vogel-Hale Corporation (Item #28).

31. In an amendment to the application for consent to assign the license of Station WGNS from Regional to Vogel-Hale Corporation, Mr. Vogel had responded to Section II, Table II by listing Regional. In response to Question 19, he had recited his then current interests in Stations WGNS, WAMA, and WHOD–AM & FM, and his pending applications for Stations WBLO and WULA–AM and FM (Item #29).

32. The Commission consented to the requested assignment of Station WGNS to the Vogel-Hale Corporation on March 13, 1970 (Item #30).

33. Again, going back, on May 5, 1960, Regional had applied for a construction permit for an AM broadcast station in Clarinda, Iowa. In Section II, Table II of that application, Mr. Vogel had listed Regional and his radio sales jobs. In response to Question 19, he recited his interests in KLOV, WMMT, WGNS, and his interests in pending applications for construction permits for Laramie, Wyoming, and McCook, Nebraska (Item #32).

34. On March 28, 1961, Mr. Vogel wrote to the Commission requesting that the application for Clarinda, Iowa, be withdrawn; and the Commission then notified Vogel, by letter of April 14, 1961, that the application was dismissed (Items #33 and 34).

35. On April 30, 1959, Regional filed with the Commission an application for a construction permit for McCook, Nebraska. In Section II, Table II of the application, Mr. Vogel listed only Regional. In response to Question 19, Vogel recited his interests in KLOV and KVRH. The application stated that Mr. Vogel would be general manager of the station (Item #35). The application was granted on September 7, 1960 (Item #36). The license covering this construction permit (BL–8715) was granted on September 19, 1961. That license application reflected a total cost of construction of $13,222.00.

36. On January 19, 1966, Regional filed with the Commission an application for its consent to the assignment of the license of Station KWRV, McCook, Nebraska, to the Semeco Broadcasting Corporation for a consideration of $91,000.00. According to Exhibit A of this application, the original cost of construction of Station KWRV had been $16,310.00. Regional's reason for requesting this transfer was "In order that Semeco Corporation may broadcast in the public interest to the McCook area". (Item #39). The Commission consented to the assignment on March 28, 1966 (Item #40).

37. On May 13, 1963, Regional had filed an application for consent to acquire Station KLIX, Twin Falls, Idaho, for a consideration of $126,000.00. According to this application, its reason for the requested acquisition was the following:

> Regional Broadcasting Corporation requests this assignment in order to operate KLIX, in the public interest and serve Twin Falls and the surrounding area in the various ways relative to broadcasting.

In Section II, Table II of the application, Mr. Vogel listed his interest in Regional. In response to Question 19, Vogel recited his interests in Stations KWRV and WGNS. The application stated that Dean Harden would become general manager of Station KLIX upon its acquisition by Regional (Item #41). The Commission consented to the assignment on July 25, 1963 (Item #43).

38. On November 30, 1966, Regional filed with the Commission an application for consent to assign the license of Station KLIX to the Sawtooth Radio Corporation for a consideration of $110,000.00. The reason given by Regional for the requested assignment was the following:

> With predominently Idaho ownership, the assignee should be in a position to provide a substantial broadcast service in the public interest to the Twin Falls, Idaho, area. (Item #46).

The Commission consented to the assignment on January 12, 1967 (Item #47).

39. On September 17, 1968, an application for assignment of license for Station WAMA, Selma, Alabama, to the Vogel-Hendrix Corporation, for a consideration of $140,000.00 was filed with the Commission (B/B Ex. 1, paragraph 48).[7] The Vogel-Hendrix Corporation, of which Mr. Vogel was 71.4 percent owner, stated that the reason for the requested assignment was the following:

> Vogel-Hendrix Corporation requests this assignment in order to operate WAMA in the public interest and serve Selma and the surrounding area in the various ways relative to broadcasting.

40. In Section II, Table II of the application, Mr. Vogel listed Regional. In response to Question 19, Vogel listed only his interest in Station WGNS. An exhibit to the application was a contract between the Vogel-Hendrix Corporation and A. Dale Hendrix which provided that upon acquisition of the station, Hendrix would become manager, and that if he remained employed as manager for one year, Hendrix would receive as compensation and without charge to him 399 shares of the Vogel-Hendrix Corporation. The contract specified that Hendrix would similarly receive another 400 shares at the end of his second year as manager and another 400 shares at the conclusion of his third year as manager of WAMA (Item #48).

41. The Commission consented to the acquisition of Station WAMA by the Vogel-Hendrix Corporation on January 31, 1969 (Item #49).

42. On November 1, 1968, applications for consent to the assignment of licenses for Stations WHOD–AM & FM, Jackson, Alabama, to the Vogel-Ellington Corporation for a consideration of $100,000.00 were filed with the Commission (B/B Ex. 1, paragraphs 52 and 55). The reason given by the Vogel-Ellington Corporation, of which Vogel was 68 percent owner, for the requested assignments was the following:[8]

> Vogel-Ellington Corporation requests this assignment in order to operate WHOD [and WHOD–FM] in the public interest, and serve Jackson and the surrounding area in the various ways relative to broadcasting. (Items #52 and 55).

43. In Section II, Table II of the applications, Mr. Vogel listed Regional. In response to Question 19, he listed his interest in Station WGNS and his pending application involving Station WAMA. An attachment to the applications was a contract between Vogel-Elling-

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[7] Ownership of Vogel-Hendrix was as follows: Vogel, 2,000 shares (71.4%); Swartzbaugh, 800 shares (28.56%) and Hendrix, 1 share (.04%).

[8] Ownership of Vogel-Ellington was as follows: Vogel, 2040 shares (67.98%); Swartzbaugh, 480 shares (15.99%); Rucker and Pilkerton, each 240 shares (8% each) and Ellington, 1 share (.03%).

ton Corporation and Hugh L. Ellington providing that, upon acquisition of the stations Ellington would manage them, and that upon completion of each full year of management by Ellington (limited to three years), he would receive as compensation and without cost to him 333 shares of the Vogel-Ellington Corporation (Items #52 and 55).

44. The Commission approved the acquisition of WHOD–AM and FM by Vogel-Ellington on January 31, 1969 (Items #53 and 56).

45. On August 28, 1969, an application for consent to the assignment of license of Station WBLO, Evergreen, Alabama, to the Vogel-Moody Corporation for a consideration of $30,000.00 was filed with the Commission. The Vogel-Moody Corporation, of which Vogel was 68 percent owner, stated that the reason for the requested assignment was the following:

> Vogel-Moody Corporation requests this assignment in order to operate Radio Station WBLO in the public interest and serve Evergreen and the surrounding area in the various ways relative to broadcasting. (Item #58).

46. In Section II, Table II of the WBLO assignment application, Mr. Vogel listed Regional. In response to Question 19, he recited his interests in Stations WGNS, WAMA, and WHOD–AM and FM. An attachment to the application was a contract between the Vogel-Moody Corporation and Billy J. Moody, providing that Moody would manage the station upon acquisition and that upon completion of each full year of management by Moody (limited to three years), he would receive 333 shares of the Vogel-Moody Corporation (Item #58).[9]

47. The Commission consented to Vogel-Moody's acquisition of Station WBLO on March 3, 1970 (Item #60).

48. On December 23, 1969, an application for consent to the transfer of control of the license of Stations WULA–AM & FM, Eufaula, Alabama, to the Vogel-Montgomery Corporation was filed with the Commission. Consideration for the transfer of control was $110,000.-00. The Vogel-Montgomery Corporation, of which Mr. Vogel was 55 percent owner, stated that the reason for the requested acquisition was the following:[10]

> Vogel-Montgomery Corporation requests this assignment to operate Radio Station WULA in the public interest and serve Eufaula and the surrounding area in the various ways relative to broadcasting. (Item #61)

49. In Section II, Table II of the Vogel-Montgomery application, Mr. Vogel listed Regional. In response to Question 19, he listed his interests in Stations WGNS, WAMA, and WHOD–AM and FM, and his pending application for Station WBLO (Item #61).

50. The Commission consented to transfer of control of the licensee of Stations WULA–AM and FM to the Vogel-Montgomery Corporation on September 2, 1970 (Items #63 and 67). On September 25, 1970, the Commission further consented to the assignment of the licenses of WULA–AM and FM to the Vogel-Montgomery Corporation (Items #64 and 68). On March 23, 1971, the Vogel-Montgomery

[9] The ownership of Vogel-Moody was as follows: Vogel, 2040 shares (67.98%); Swartzbaugh, 480 shares (15.99%); Rucker and Pilkerton, 240 shares each (8% each) and Moody, 1 share (.05%).

[10] The ownership of Vogel-Montgomery was as follows: Vogel, 2750 shares (55%); Swartzbaugh, 500 shares (10%); Rucker, Pilkerton, Rose, Bethel, Smith, Hay, and Hackman, 250 shares each (5% each).

Corporation filed an application with the Commission for consent to change the name of the licensee of WULA–AM and FM to the Vogel-Milligan Corporation (Item #65); Commission consent was granted on April 13, 1971 (Item #66).

51. On April 13, 1970, an application for consent to the assignment of license for Station WMPI (FM), Scottsburg, Indiana, to the Vogel-Bell Corporation for a consideration of $55,000.00 was filed with the Commission. The Vogel-Bell Corporation, of which Vogel was 63 percent owner, stated that the reason for the requested acquisition was the following: [11]

> Vogel-Bell requests this assignment in order to operate Radio Station WMPI in the public interest and serve Scottsburg and the surrounding area in the various ways relative to broadcasting. (Item #69)

52. In Section II, Table II of the Vogel-Bell application, Mr. Vogel listed Regional. In response to Question 19, Vogel listed his interests in Stations WGNS, WAMA, WHOD–AM and FM, WBLO, and his pending application for WULA. An exhibit with the application is a contract between the Vogel-Bell Corporation and Wes Bell which provided that Bell would manage the station upon acquisition and that upon completion of each full year of management by Bell (limited to three years), he would receive as compensation and without cost to him 63 shares of the Vogel-Bell Corporation (Item #69).

53. The Commission consented to assignment of license for WMPI (FM) to the Vogel-Bell Corporation on July 23, 1970 (Item #71).

54. On March 31, 1970, an application for consent to the assignment of license of Station WIFN (FM), Franklin, Indiana, to the Vogel-Douglas Corporation for a consideration of $130,000.00 was filed with the Commission (B/B Ex. 1, paragraph 72, Item #72). Vogel-Douglas Corporation, of which Vogel was 63 percent owner, represented that the reason for the requested acquisition was the following: [12]

> Vogel-Douglas Corporation requests this assignment in order to operate WIFN in the public interest and serve Franklin and the surrounding area in the various ways relative to broadcasting. (Item #72)

55. In Section II, Table II of the application, Vogel-Douglas listed Regional. In response to Question 19, Mr. Vogel recited his interests in Stations WGNS, WAMA, WHOD–AM and FM, and WBLO, and his pending application for Station WULA. Attached to the application as an exhibit was a contract between Vogel-Douglas and Ron Douglas, which provided that the latter would manage the station and that upon completion of each full year of management (limited to three years), he would receive 63 shares of the Vogel-Douglas Corporation as compensation and without charge to Douglas (Item #72).

56. The Commission consented to assignment of license for WIFN (FM) to the Vogel-Douglas Corporation on July 15, 1970 (Item #73).

57. The following table of Mr. Vogel's acquisition and disposal of broadcast interests can be constructed:

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[11] The ownership of Vogel-Bell was as follows: Vogel, 510 shares (62.9%); Swartzbaugh, 100 shares (12.3%); McFarland, 100 shares (12.3%); Lovelace, 100 shares (12.3%); and Bell, 1 share (0.2%).

[12] The ownership of Vogel-Douglas was as follows: Vogel, 509 shares (62.7%); Swartzbaugh, McFarland, and Richardson, 75 shares each (9.2% each); Hendrix and Warren, 138 shares each (4.1% each); and Douglas, 1 share (0.2%).

Station	Purchase date [13]	Sale date [13]	Purchase price	Sale Price	Time held
KLOV, Loveland, Colo	July 18, 1956	Jan. 3, 1962	$25,500	$68,000	5¼ yrs.
KVRH, Salida, Colo	Nov. 25, 1958	Sept. 23, 1959	10,000	37,500	10 Mos.
WMMT, (WAKI), McMinnville, Tenn	Oct. 7, 1959	Feb. 6, 1962	82,500	92,500	2½ yrs.
WGNS, Murfreesboro, Tenn	Feb. 10, 1960		100,000		
KWRV (KICX), McCook, Nebr	Sept. 19, 1961	Mar. 28, 1966	16,000	91,000	4½ yrs.
KLIX, Twin Falls, Idaho	July 25, 1963	Jan. 12, 1967	126,000	110,000	[14] 3½ yrs.
WAMA, Selma, Ala	Jan. 31, 1969		140,000		
WHOD-AM and FM, Jackson, Ala	do		160,000		
WBLO, Evergreen, Ala	Mar. 3, 1970		30,000		
WULA-AM and FM, Eufaula, Ala	Sept. 2, 1970		110,000		
WMPI (FM), Scottsburg, Ind	July 23, 1970		55,000		
WIFN (FM), Franklin, Ind	July 15, 1970		130,000		

[13] The dates of Commission approval of acquisition or disposal of Vogel stations are the dates specified in the table in the text.

[14] Station KLIX was sold by Mr. Vogel subsequent to promulgation of the so-called "three-year rule". For purposes of that rule, the Station KLIX license file reveals that Mr. Vogel had assumed control of Station KLIX on August 5, 1963, and had contracted to sell it on October 26, 1966.

58. Ownership reports filed by Regional indicate that at least some managers of Regional-licensed broadcast stations had been made shareholders in Regional and that their ownership interests in Regional had been increased as they continued to work for Regional. Thus, W. O. Corrick was the general manager of Station KVRH during Regional's licenseeship (Item #15). Subsequently, Corrick became general manager of KWRV (Items #37 and 38). Regional ownership reports indicate that Corrick received seven shares (one percent) of Regional stock as of July 8, 1959, for services rendered (Item #76); and that he had subsequently received an additional 12 shares, giving him a total of 19 shares (2.5 percent) on June 22, 1960, also for services rendered (Item #80).

59. On May 20, 1961, Corrick received an additional 15 shares of Regional stock for services rendered. That made his total 34 shares (4.3 percent) (Item #82). On January 20, 1964, Corrick received an additional eight shares of Regional stock, making his total 42 shares (5.2 percent) (Item #86). Corrick received an additional 18 shares on March 31, 1965, bringing his total to 60 shares, 7.3 percent of the outstanding shares in Regional (Item #89). On May 17, 1966, Regional acquired the 60 shares from Corrick as part of the transaction in which a corporation controlled by Corrick acquired KWRV from Regional (Items #39 and 91).

60. Another Regional station manager was David Martin (Item #32, Section II, Table II). Martin received six shares (.8 percent) of Regional stock on June 22, 1960, for services rendered. On May 20, 1961, he received an additional 15 shares, for a total of 21 shares (2.6 percent) also for services rendered (Item #82). By April 1, 1962, Regional had apparently purchased Martin's 21 shares (Item #83).

61. Dean Harden managed KLIX for Regional for a period of time (Item #41). As of April 1, 1962, Harden had received 21 shares (2.7 percent) of the Regional stock (Item #83). By May 3, 1963, he had received one additional share, giving him 22 shares or 2.8 percent (Item #84). On May 17, 1966, Regional purchased Harden's 22 shares (Item #91).

62. Item #113 of the parties' stipulation, *supra*, consists of financial data apparently extracted from the Annual Financial Reports (FCC

Form 324) filed with the Commission for Regional-licensed broadcast stations. It indicates, *inter alia*, that several of these stations suffered substantial operating losses during certain years, *e.g.* Station KLOV (a loss of $1,930 during 1961); Station KVRH (a loss of $11,136 during 1959); and Station KLIX (a loss for each of the years 1964–1967, aggregating approximately $105,000, in round figures). Additional financial details are set out in Item #114, as to which paragraph 56 of the Broadcast Bureau's proposed findings of fact is hereby adopted and incorporated herein by reference.

63. During the pendency of the application by the Vogel-Bolen Corporation to acquire Station WNON (FM), Lebanon, Indiana, the Commission's Staff addressed a letter (dated March 17, 1971) to Mr. Vogel asking him to explain why there had been no listing of Vogel's past broadcast interests in Stations KLOV, KVRH, WAKI (WMMT), KICX (KWRV), and KLIX in recent applications filed by Vogel Corporations for Commission consent to acquire stations. Mr. Vogel, *inter alia*, was also requested to explain how his

> activities in broadcasting, including the sale and subsequent purchases of stations, comports with the Commission's policies against trafficking in broadcast licenses. (Item #109)

64. Mr. Vogel responded to the Staff by letter dated April 5, 1971 (Item #110). He offered the following explanation of his omissions to indicate past broadcast interests in his application for consent to acquire Station WAMA:

> As Commission records will reflect, over the years I have not used FCC counsel until application was made to acquire Radio Station WULA at Eufaula, Alabama. This was the only application in which I obtained the services of FCC counsel to assist me in preparing and making the necessary filing at FCC. The reason for retaining counsel of the WULA acquisition was at the insistence of the Seller who agreed to share the high legal expenses. All of the other filings, including WMAF, Madison, Florida and WHON, Lebanon, Indiana, have been made by me personally without the expenses of retaining competent but highly expensive legal talent. In the 15 years that I have been personally sending in applications for transfer to the FCC, I have never answered paragraph 19 of Section II in a manner that would reflect *past* broadcast interests of me or any of my associates. In every case my applications have been approved. The Commission never at any time asked me for that information nor indicated to me that it was necessary. I simply did not understand the question to require a listing of past broadcast interests. Recently in talking with a staff member of the FCC on the phone concerning the WMAF application, he pointed this out to me and at that time I amended that application by listing all my past broadcast interests. The WNON, Lebanon, Indiana application (the one to which this is being addressed) had already been filed with the Commission when I was advised of this. At no time did I willfully or intentionally fail to respond to any question in a form or otherwise. It was always my understanding and continues to be my understanding that the FCC has a full record of my past and present broadcast ownership (as evidenced by your letter of March 17) and that this information was and continues to be a matter of record at the FCC. Therefore, I did not understand Section II to require the information which has now been brought to my attention. I had absolutely no idea that this information was required.
>
> It must be clear to the Commission that I at no time willfully or intentionally refused to fully answer any question set forth in FCC Form 314 or 315. I deeply regret this inadvertence and steadfastly maintain that there was no reason whatsoever for me to shield this information already of record from FCC. Whatever my mistake it was unintentional and devoid of any ulterior motive.

65. Regarding the inquiry as to how his station transactions comported with Commission policies on trafficking, Vogel replied:

As set forth in the KLOV assignment application, I sold KLOV because of my move from the mid-west region of the United States to McMinnville, Tennessee. Because of management problems I experienced after I moved I determined it was not feasible to direct and administer the station from this distance without competent help. As a result, I sold the station.

I owned and operated WAKI at McMinnville, Tennessee as a local owner and operator. However, the very competent manager at Radio Station WGNS gave notice of his resignation leaving an absolute void in management at WGNS. I then made the decision to move to Murfreesboro, Tennessee and operate Station WGNS personally. Inasmuch as I could not be in two places at one time I decided it would be in the public interest to dispose of the station to someone who would own it and operate it locally.

I sold Radio Station KVRH at Salida, Colorado because of my move to McMinnville, Tennessee. I had anticipated living for a longer period of time in the Colorado area. However, when it became necessary for me to move to Tennessee I deemed it would be in the best interest of all concerned to sell the station to a local group because a local group would be more sensitive to the local needs and interests of the people as I was during my tenure there.

I sold KLIX to a local Idaho people who expressed an interest in buying a station in the Twin Falls area. Inasmuch as I was living in Tennessee at the time, it appeared to be the prudent thing to do inasmuch as the distance between Tennessee and Iadho was proving to be a great hardship. KICX at McCook, Nebraska was sold for the same reason that I sold KLIX at Twin Falls, Idaho. The distance between this region of the United States and my home in Tennessee made it continually more difficult to devote the time and attention necessary. When local people expressed interest in owning the stations I willingly went forward to sell the stations to local groups who were closer to the scene.

66. Mr. Vogel included a memorandum of law regarding trafficking with his letter. This memorandum stated that when Mr. Vogel had moved from the Mid-West region of the United States to the South and subsequently had management problems at the far-away stations in the West, in accordance with good business judgment, he had disposed of the far-away stations. Mr. Vogel's letter also stated that he had studied the memorandum of law and that, on the basis of that memorandum, he did not consider his activities to conflict in any way with the Commission's policies regarding trafficking.

67. Subsequent to the receipt of Mr. Vogel's letter of April 5, 1971, the Commission Staff sent another letter (dated April 27, 1971) to Mr. Vogel (Item #111), which asked him to explain how he reconciled his proposed control of stations in Indiana and Florida while residing in Tennessee with the reasons given in his letter of April 5, 1971, for his previous disposal of distant stations. It further requested an explanation as to why his amendment to the application for consent to acquire Station WMAF in order to reflect Mr. Vogel's past broadcast interests had omitted his past interests in construction permits for Laramie, Wyoming, and Clarinda, Iowa.

68. Mr. Vogel responded by letter dated May 1, 1971, offering the following explanations of his acquisitions of distant stations in light of his past transactions:

I sincerely believe that my actions in acquiring Stations outside the State of Tennessee are consistent with my earlier declarations to the Commission and that operation of these Stations is and will continue to be in the public interest.

If you will note, each of the broadcast stations outside of the State of Tennessee in which I hold a majority interest has a *local managing stockholder*. I learned from my experiences at KLOV, KICX, KLIX and KVRH that local participation in small independent radio stations is essential. Therefore, at WHOD, WBLO, WULA, WAMA, WIFN and WMPI, I have associated myself with a strong local individual with broadcast experience in an attempt to provide

the people of the several communities with the best possible broadcast service available. I have found this combination effective in bringing about the desired result of operation in the public interest and both WMAF and WNON will have a full-time General Manager residing in the community of license with a substantial stock ownership.

By having a strong local General Manager with broadcast experience and significant stock ownership in the radio station as a partner, I have corrected the earlier problems that plagued my ownership of distant radio stations. The present management ownership set-up permits the orderly and efficient operation of small independent radio stations in small communities consistent with the public interest. This is how I am able to "reconcile" station-ownership in Indiana and Florida with my residence in Tennessee.

69. Mr. Vogel's letter offered the following explanation for his failure to include his prior interests in construction permits for Laramie, Wyoming, and Clarinda, Iowa, in his amendment to a pending application for consent to acquire a station:

I did not include prior holdings in the Laramie, Wyoming and Clarinda, [Iowa] Construction Permits because I did not understand that these interests were to be included. These stations were not in operation during the period I held an ownership interest.

70. Mr. Vogel currently resides in Murfreesboro, Tennessee. The unquestioned evidence of record shows that he had prepared the application himself for Commission consent to the acquisition of KLOV by Vogel & Smock, without assistance of anyone. It also shows that upon acquisition, he became manager of the station and resided in Loveland, as he had informed the Commission he would, and that he remained in such position until the close of 1959. He also testified herein that when Vogel & Smock acquired Station KLOV the station had had no equipment besides a transmitter and two tape recorders designed for home use, and no staff other than the two partners and a part-time student employee. There is no basis in the record for questioning this testimony.

71. The evidence of record shows that once Station KLOV was acquired, Mr. Vogel and his associates had expended in excess of $20,000.00 on new equipment, furniture, and fixtures for the station, although Mr. Vogel was unable to explain why such expenditures were not reflected in Item #114, which was compiled from annual financial reports (Form 324) filed with the Commission.

72. Mr. Vogel, it appears, also had prepared the renewal applications for Station KLOV without assistance from anyone or counsel, as well as the application for consent to the sale of Station KLOV by Regional. The evidence indicates that the Commission never questioned the stated reason for the sale of Station KLOV, *i.e.*, that the distance between McMinnville, Tennessee, and Loveland, Colorado, made it economically unfeasible to operate Station KLOV in connection with the sale itself. Uncontested evidence shows that Station KLOV had not been listed with any broker when it was decided to sell it and that during Mr. Vogel's operation of that station, it never had been fined or censured by the Commission or by any state or local authority, and that it had received full three-year renewals of its license from the Commission.

73. Mr. Vogel had also prepared the application for consent to acquire Station KVRH without assistance of counsel or anyone else. He acknowledged that in response to Question 19 of the application,

he had not listed his previous jobs as a radio time sales manager—information which had been included in the application for consent to acquire Station KLOV—because, with the exception of the KLOV application, he had believed that Question 19(a) merely called for a listing of stations an applicant *currently* owned. He represented during the hearing that in reading Question 19, he had missed the word "had" in the question, and that there was simply no reason or motive for him to intentionally omit his past radio jobs. Mr. Vogel also observed that the Commission had not questioned the reason given for requesting the acquisition of Station KVRH—to purchase the assets of the Heart of the Rockies Broadcasting Company, Inc. The parties from whom Mr. Vogel and his associates had purchased Station KVRH did not reside in Salida, the location of the station, but had hired a manager for the station who had had no previous radio experience. The evidence, however, indicates that previous to his acquisition of Station KVRH, Mr. Vogel had inspected the facilities of that station and knew that it was a "distressed station"; that is, the equipment was in such bad condition that the station had a difficult time remaining on the air, and was violating numerous Commission rules. It was also losing money. After Mr. Vogel and his associates had acquired Station KVRH, he remained in Loveland, and his assistant at Loveland—W. O. Corrick—was made manager of Station KVRH and moved to Salida. The evidence indicates that it had been necessary for Mr. Vogel to purchase new equipment and repair old equipment for the station; that he had brought a newswire into the station; that he restaffed the station; and that he had modified the logs utilized in order to comply with Commission regulations. Mr. Vogel apparently visited the station at the time approximately every 10 days or two weeks.

74. In response to inquiry as to his reasons for selling Station KVRH after a period of only 10 months, Mr. Vogel explained that he and Mr. Corrick had decided that they could not succeed in that market. They had spent a large sum of money building up the station and had built up the gross substantially, but it was still a losing proposition, and they decided they had lost as much as they could afford to lose. No evidence was adduced to refute this rationale. Mr. Vogel also testified that when Regional had sold Station KVRH for $37,500.00, they were trying to get out of the station what they had put into it, which he estimated was in excess of $20,000.00 plus time and effort, in addition to monthly operating losses for 10 months. No evidence was presented in refutation of this testimony. Station KVRH, it was shown, was not sold for cash, but for a $8000 downpayment, with the balance payable over 10 years. The $8000 downpayment, according to the unrebutted evidence, was used to pay the bank for debts incurred in purchasing equipment for the station. The purchaser of the station moved to Salida upon acquisition of the station.

75. During the operation of Station KVRH by Mr. Vogel and his associates, the station never received a short-term license renewal, fine, or censure by the Commission, or censure by any state or local authority, and no complaints against the station were ever brought to Mr. Vogel's attention by the Commission.

76. Mr. Vogel accepted the fact that Regional's application for consent to sell Station KVRH (Item #18) and its application for consent to purchase Station WMMT (Item #20) had been filed with the Commission within one or two weeks of each other, but he averred that the Commission had never questioned him about this. Although the application for consent to acquire Station WMMT had stated that Mr. Vogel would become general manager of the station, Mr. Vogel denied that by this he meant to convey the idea that he was going to move to Tennessee at that time, or that such a planned move was part of the reason for seeking to acquire the station. Indeed, he testified that he had represented (in Item #20) that he would be the general manager of Station WMMT because he did not know at the time who would be the manager of the station. There is no basis in the record for disputing the probity of the witness in so testifying. Mr. Vogel testified, further, that he had decided to make Mr. David Martin, his assistant at Station KLOV, manager of Station WMMT, and that he (Vogel) had gone to Tennessee a few months later to manage WGNS and had ultimately wound up managing Station WMMT for a period.[15] Mr. Vogel also testified that he had inspected the facilities of Station WMMT before Regional had acquired the station and that they were "reasonably run down". Regional had upgraded the power of the station, purchased and installed a new transmitter, completely changed the staff of the station, and modified the programming format. Mr. Vogel prepared a renewal application for Station WMMT (Item #22) without assistance from anyone or counsel, and the application was granted without inquiry by the Commission.

77. Mr. Vogel had also prepared the application for the Commission's consent to the sale of Station WMMT (Item #23) by Regional by himself, without assistance from anyone or by counsel. He represented that the reason for the sale was the resignation of Martin, the manager at Station WGNS, and the fact that Mr. Vogel had wished to manage Station WGNS, which would leave Station WMMT without a manager. The Commission did not inquire about the stated reason for the sale and there is no basis for disputing its veracity in the evidence adduced herein. Mr. Vogel testified further that prior to the decision to sell Station WMMT, an effort had been made to replace the Station WGNS manager who had resigned, and that Regional was also faced with the difficulty of trying to find a competent manager for Station KLOV at the same time. This testimony was inherently reasonable and there is nothing of record to justify disbelief in it.

78. Mr. Vogel testified that the persons to whom Station WMMT was sold by Regional were three Eastern Tennessee radio men who seemed to be good broadcasters, which was important to Regional because the sale had not been for cash. He stated that the purchasers resided about 100 miles further away from Station WMMT than Mr. Vogel did as manager of Station WGNS, but that they had advised

[15] The WGNS assignment application indicated that Mr. Vogel would be general manager of WGNS (Item #25). It appears that Mr. Vogel was general manager of WGNS for about 30 days during early 1960 and then that he had switched positions with Martin and had become manager of Station WMMT instead.

him that one of the three would move to McMinnville to operate the station. This testimony was inherently reasonable and unrebutted. It may be accepted as true.

79. Mr. Vogel acknowledged that Mr. Dean Harden, whom Mr. Vogel would subsequently make manager of Station KLIX in Idaho, was on his staff at Station WMMT at the time it was sold, but he stated that at the time a manager for Station WMMT was needed, in order to avoid the necessity of selling the station, and he had not considered Harden ready to manage.

80. During the period that Regional owned Station WMMT, it did not receive any short-term license renewals from the Commission; nor was it fined. It did not receive any letters of complaint.

81. During the hearing Mr. Vogel explained that he had prepared the application for consent to acquire Station WGNS without assistance of counsel or anyone. This was the first time he had been faced with the requirement to report a past broadcast interest, namely, of Station KVRH. He omitted to do so, explaining that he had not listed his *past* interest in Station KVRH in response to Question 19 of the application because he had thought the question called only for *present* broadcast interests. In Table II, Section II of the application for consent to acquire WGNS, however, Mr. Vogel had listed his radio sales jobs within the past five years, (*i.e.*, information he had omitted in the application for consent to acquire KVRH) and he explained the difference in treatment as attributable to his increased experience with Commission forms. He also pointed out that the Commission had not questioned the reason he gave for acquiring Station WGNS—to operate Station WGNS in the public interest and to serve the Murfreesboro area. It was represented in that application that Mr. Vogel would be the manager of Station WGNS. He testified that he did go to Murfreesboro and did manage Station WGNS for about 30 days; then he and David Martin at McMinnville had decided to switch stations. Mr. Vogel testified that the owners from whom Regional had purchased Station WGNS lived in Murfreesboro, but had operated the station as a "hobby". He claimed that the station had been badly run, with poor equipment, poor programming, and a poor relationship with the Commission prior to its purchase by Regional. All of this testimony appeared to be candid and truthful.

82. During the licenseeship of Station WGNS by Regional and the Vogel-Hale Corporation, the station has never received short-term license renewals or fines from the Commission.

83. Mr. Vogel's unrebutted testimony shows that the Commission had never raised any questions regarding Regional's application for a construction permit for a broadcast facility in Clarinda, Iowa, either when it was filed or when it was dismissed. Mr. Vogel's unrebutted testimony was that the reason for dismissing the application set out in his letter to the Commission requesting withdrawal of the application—that an existing station had returned to the frequency Mr. Vogel was requesting, thus making his application untenable—was true.

84. Mr. Vogel stated that he had prepared the application for a construction permit for a broadcast facility in McCook, Nebraska (Item #35) himself without assistance of anyone or of counsel. Again he

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acknowledged that he had omitted setting out his past broadcast interests in the application, and affirmed that the Commission had never questioned him about the omission and had never questioned the qualifications of either Regional or Vogel as licensees of the Commission. There is no evidential basis for doubting his veracity here. He stated that the cost of construction of the McCook station (KWRV) was between $25,000.00 and $30,000.00. Mr. Corrick became manager of Station KWRV and moved to McCook. In 1966, Mr. Corrick informed Mr. Vogel that he (Corrick) was going to purchase a radio station in McCook. Mr. Vogel had known that the other station in McCook, Nebraska was for sale at the time. He indicated that he did not want to compete against a station operated by Corrick. Thus, Mr. Vogel sold Station KWRV to Corrick. Messrs. Corrick and Vogel prepared the application for consent to the assignment of license of Station KWRV, and the reason set out by Regional for the sale—in order that Semeco Broadcasting Corporation may broadcast in the public interest to the McCook area—was never questioned by the Commission. (Corrick was the general manager and principal shareholder of Semeco Broadcasting Corporation). There is no evidential basis herein for doubting the truth and accuracy of such testimony.

85. It was Mr. Vogel's unrebutted testimony that the reason for the sale of Station KWRV, provided in his letter of April 5, 1971 to the Commission (Item #110)—that it had been sold to local people when the distance between McCook and Mr. Vogel's residence in Tennessee became an impediment in operating the station—was correct, in that he would not have sold Station KWRV had he lived in McCook. He conceded, however, that the statement in Item #110, that distance made it "continually" more difficult to operate Station KWRV, was misleading. Thus, Station KWRV was not sold because of problems during Mr. Corrick's management. On the contrary, it had been sold because Mr. Vogel did not feel he could operate the station if Corrick left the station and became his competitor in the market. It appears that during Regional's operation of Station KWRV, that station received no short-term license renewals or fines from the Commission, and had no complaints lodged against it.

86. Mr. Vogel affirmed during the hearing that he had prepared Regional's application for consent to acquire Station KLIX (Item #41) without the assistance of counsel or anyone, and that his intention when he applied for the station, and when he acquired it, was to hold it indefinitely. The Commission never questioned Mr. Vogel regarding the reason given for the requested acquisition—to operate Station KLIX in the public interest and to serve the Twin Falls area.

87. Mr. Vogel's unrebutted testimony was that he had inspected the facilities of Station KLIX before Regional had purchased it and that they were excellent. Thus, Station KLIX was the exception to the rule that he would only buy "dog" radio stations. Because of the ultimate failure of Regional's operation of Station KLIX, according to Vogel, there was a joke within Regional that Vogel had been 'very successful in taking bad stations and building them up, but the only time he bought a good station, it went down'.

88. Mr. Vogel agreed that he had purchased Station KLIX after disposing of other distant stations for the stated reason that he could

not operate the distant radio stations successfully. He explained that, prior to purchasing Station KLIX, he had had a manager for Station KLIX, whereas the reason for disposing of the other stations was the combination of lacking a good station manager and distance. For if a station had a good manager, Mr. Vogel would not have to supervise and visit it frequently, and distance alone would not be a problem. On the other hand, if he could not find a competent manager, long distance was an insurmountable problem due to the expense involved in making frequent trips to the station. Mr. Vogel explained further that Dean Harden had worked for him for 3½ years and had been assistant manager at Station WGNS before he had made Harden manager of Station KLIX. But, for the time that Harden was manager of Station KLIX, the station about broke even; and after a few months, Harden developed a mental illness that forced Mr. Vogel to bring him back to Tennessee, ultimately requiring his dismissal. Vogel tried three replacements for Harden, none of whom was successful, and the station lost money under their operation. After 3½ years of ownership of the station, Vogel finally sold it. He testified that he had retained the station for that length of time because he thought it had been his responsibility to do so. This testimony is accepted as a credible exposition of facts.

89. Mr. Vogel had prepared the application for consent to sell Station KLIX (Item #46) himself, without assistance of anyone or of counsel. The Commission never questioned the reasons he had given for the sale of Station KLIX—that with predominently Idaho ownership, the assignee should be able to provide substantial service in the public interest to the Twin Falls area. Also, it is officially noted that during Regional's operation of Station KLIX, the Commission granted regular, full three-year renewals of the station license.

90. Vogel's testimony (as to which no impeaching evidence was adduced) indicates that substantial sums of money had been spent to improve the physical facilities of every station owned by Mr. Vogel and his companies. It also shows, quite candidly, that between 1967 and 1970, Mr. Vogel acquired Stations WAMA, WHOD–AM and FM, WBLO, WULA–AM and FM, WMPI (FM), and WIFN (FM), and that he had not listed his prior holdings in broadcast stations in any of the applications to acquire these stations. The reason Mr. Vogel gave for the omission was that he did not understand that Question 19 of the assignment applications called for a recitation of *past* broadcast interests. Moreover, he pointed out, all but three of the stations acquired since 1967 have been granted full-term renewals of license by the Commission; and in processing these renewal applications, the Commission never questioned Mr. Vogel or his companies regarding his past broadcast interests. Further, Vogel stated that he had personally prepared all of the assignment applications for the post-1967 acquisitions with the exception of the application for consent to acquire Station WULA; and that the WULA application did not include information regarding his past interests because Mr. Vogel had not provided the information to his attorney because he (Vogel) did not think it was required by the application.

91. Mr. Vogel's explanation of his arrangement with managers of the stations he now controls through various Vogel Corporations was

that while under both the prior, so-called "Regional" arrangement and under his new arrangement the station managers are local residents, there is a major difference between the new system and the "Regional" system, in that each of Mr. Vogel's *current* station managers receives an interest in a corporation to which is licensed only the station he manages, whereas "Regional" managers had received Regional stock, the value of which was affected by the success or failure of *all* of Regional's stations. Mr. Vogel also claimed that due to his greater experience in broadcasting, he now has acquired better judgment in selecting his station managers. Further, he explained that the lowest percentage of stock in a current Vogel Corporation that a manager owns is 16 percent, and managers can acquire as much as 30 percent, while the largest percentage of Regional stock which any "Regional" manager had acquired was approximately eight percent.

92. The evidence indicates that Mr. Vogel had known the persons he had hired as managers of his currently owned stations for the following periods of time before hiring them:

Hugh L. Ellington—"A couple of weeks."
A. Dale Hendrix—three or four years.
Jerry W. Milligan—two years.
Ron Douglas—"A couple of weeks."
Wesley Bel—"A couple of weeks."

It seems that Mr. Bell, *supra*, did not last and there were three subsequent replacements for him. Despite the experience he had had with Bell, Mr. Vogel insisted that his ability to select managers is better now than it had been under the old "Regional" arrangement. Be that as it may, Mr. Vogel's experience in this area and his presently proclaimed self-confidence in his ability to select competent employees appears to have very little bearing, if any, upon the veracity of the explanation he gave for his business *modus operandi*. Both in its filed pleading and on the record during the hearing the Broadcast Bureau has omitted, or failed, to demonstrate persuasively the materiality of that kind of data and its probative value under the issues.

93. The Examiner is especially unable to agree with the Bureau's effort at analysis beginning with paragraph 122 of its proposed findings, under the heading "Inconsistencies in Vogel's Representations to the Commission". For the alleged inconsistencies asserted therein seem to be, at best, the end-result of running a myriad of minutiae, encompassing a period of 15 years, through a strainer with the idea in advance of finding Mr. Vogel unqualified. No weight whatsoever was given by the Bureau in this analysis to the frailties of memory; nor, indeed, was any serious evidentiary effort made by the Bureau during the hearing itself to confront Mr. Vogel *explicitly* with what the Bureau now claims, for the first time specifically in its proposed findings, are inconsistencies, so that he could try to separate the wheat from the chaff, as it were, himself. Thus, paragraph 124 of the Bureau's proposed findings seems, in particular, to be a wrenching of facts from their proper context while asserting an inference ("Management problems developed because of Vogel and Regional's expansion beyond its capacity to find competent managers") that was neither supported

by the facts recited in that paragraph nor by the citations given to the hearing transcript.[16]

In short, to the extent that one could conclude there were some inconsistencies between several of Mr. Vogel's statements in the mountainous compilation of application and other filed data included in counsels' stipulation, and in Mr. Vogel's oral testimony, the Examiner is persuaded they were generally trivial and certainly not the kind of thing that would justify ruining a man's business by cancelling his broadcast station licenses.[17]

94. It is perhaps useful to stress at this juncture that while Stations KLOV, KVRH and WMMT had all been sold by Mr. Vogel and his associates prior to the Commision's 1962 adoption of Rule 1.597, which prescribes a minimum 3-year holding period for all broadcast licensees, Mr. Vogel had held Station KLOV for a period of some 5½ years and WMMT for about 28 months, and that only Station KVRH had been purchased and sold over a period of less than one year; and that after the adoption of the 3-year holding period Mr. Vogel sold Station KWRV after approximately six years and Station KLIX after 3½ years. Indeed, with regard to Station KLIX, it appears affirmatively that despite substantial operating losses and financial distress that might have afforded Mr. Vogel an "out" under the 3-year holding rule, Mr. Vogel held on to that station for 3½ years. These facts are cited by the Examiner because they tend to demonstrate the unfairness of the Bureau's contention that Mr. Vogel had expanded his business beyond his capacity to find competent managers. Moreover, it is also *a fact* that the instant record is *completely* barren of any evidence, even a scintilla, that would tend to reflect adversely on the programming, or any other significant aspect of the operation or management, of *any* of Mr. Vogel's stations, past or present. In these circumstances, it may not only be unjust to Mr. Vogel for the Commission to utilize the present record as a basis for discrediting Mr. Vogel's reputation, but it may also be directly injurious to the public interest itself, to the extent that the public may be ultimately deprived thereby of the benefits of what could well be a creditable programming performance.[18]

95. It is also considered to be of some importance to the reaching of a just and proper adjudication herein, to note that Mr. Vogel's unequivocal and categorical representation during the course of the hearing that when he had acquired any radio station, either as a principal or as a stockholder of a licensee corporation, it had never been for the purpose of reselling it at a profit, is entitled to some degree of respect, especially in the light of a hearing record that contains no objective proof that Mr. Vogel lied when he said this. It must likewise

[16] It appears to the Examiner that paragraphs 15 and 16 of the applicant's proposed findings are a more accurate explanation of any inconsistency involving Station KLOV than the Bureau's. The record, indeed, shows that while Mr. Corrick had managed Station KLOV, little of Mr. Vogel's time had been required to supervise the management of that station; that the situation changed when Mr. Gerrard became its manager and the station started to go down-hill; that it was at that point of time that the distance between Tennessee and Colorado became onerous to Mr. Vogel.

[17] It is of course recognized that findings adverse to Mr. Vogel in this proceeding would result only in the denial of the applications which are the subject of the present proceeding. However, the practicality of the situation is that all of Mr. Vogel's station licenses would be in future jeopardy.

[18] There is unimpeached evidence (T.69) that the City of Loveland, Colorado had applauded Mr. Vogel's management of Station KLOV and that he had enjoyed an "excellent reputation" as a broadcaster in that city.

be noted here that after Mr. Vogel represented during the hearing that he certainly had no intention of concealing from the Commission the data concerning his *past* broadcast interests, not a scintilla of evidence was adduced to show that Mr. Vogel had any believable motive to conceal such information. Indeed, as everyone knows who understands the staff processing of applications in the Commission's Broadcast Bureau, such information has always been available at the touch of a fingertip and is now computerized. Thus, when Mr. Vogel testified (T.93) that he knew of no advantage at the time his various applications had been prepared for him not to correctly answer Question 19 on the application forms and that ". . . even if I had known of a reason, I knew the Commission had the information in their files down the hall, and that it would be ridiculous to try and hide anything from the Commission anyway", he was speaking the unvarnished truth. In fact, it is incredible to this Hearing Examiner that anyone in authority should have found it necessary, in the first place, to raise questions, *after the lapse of so many years*, concerning Mr. Vogel's failure to tell the Commission in application forms he filed long ago what the Commission presumably already knew. If such questions are to be asked one may wonder why they are not asked when the particular applications involved are being processed. For the Staff to sit back in silence, as it seems to have done in the present instance, while one application after another lacking a full or accurate response to Question 19 on the form is processed and presented to the Commission for its approval, until years later, when the applicant-licensee is suddenly clobbered for allegedly concealing the information, would appear to be a kind of entrapment that ought to be given no sanction by this Commission.

96. What applies to the failure or omission of Mr. Vogel to provide full responses to Question 19 on the assignment of license application forms appears to apply, with equal force, to Question 3 of FCC Form 314, Section I, which calls upon the assignor to "Give a full statement of [his] reasons or purposes for requesting this assignment", and to the similar query to the proposed assignee (Question 1 of Part II). *If* it is important to have specific answers to these questions, it would seem to be much more appropriate for the Commission's Staff to seek such answers while the facts are fresh in mind, instead of sitting back, and trying, years afterward (and several applications later), to hit licensee-applicants with accusations of having given inconsistent responses in a number of previous applications that had been granted by the Commission. If it is the Commission's purpose to prevent "trafficking" in broadcast licenses by including such questions in the application forms, it would appear that both this purpose and the ends of justice would be better served with a more effective surveillance at the time when each application is being processed.

97. *The record shows that the last time Mr. Vogel or his company sought to sell any radio station was back in 1966, some five years ago,* when he applied for consent to the sale of Station KLIX. Between 1966 and 1971, no Vogel-licensed stations has been sold at all. Mr. Vogel, since 1966, *only sought to acquire* broadcast facilities (T. 153, 154).

Indeed, between 1967 and 1970 he acquired the following, all of course with Commission consent (T. 154):

WAMA—Selma, Ala.
WHOD—Jackson, Ala.
WVLA—Evergreen, Ala.
WULA—Eufala, Ala.
WMPI—Scottsburg, Ind.
WIFN—Franklin, Ind.

Station WAMA was acquired by Vogel in 1968 and the Vogel-Hendrix Corp. was organized for the specific purpose of becoming the licensee of that station (T. 155). Station WHOD was acquired by the Vogel-Ellington Corp. with Mr. Ellington as Vice President and General Manager and 25% stockholder (T. 185). Mr. Vogel's corporations each became the licensee without any questions being asked or challenges being made by the Commission or its Staff (T. 156, 157). In each of the applications that had been filed the applicant failed or omitted to list Mr. Vogel's past broadcast interests because Mr. Vogel interpreted the question on the application form, in each such instance, to refer only to "present" broadcast interests (T. 157).

98. The Commission has granted renewal of license applications for Stations WAMA, WHOD and WVLA, filed by Vogel licensees as recently as a year ago (1970). It has never before raised any questions concerning Mr. Vogel's past broadcast interests in connection with any of such renewals (T. 158).

99. The Examiner *carefully* observed Mr. Vogel's demeanor and attitudes while testifying. He is thoroughly satisfied by this gentleman's soft tone of voice, readiness to answer questions, poise and dignity on the stand, that Mr. Vogel was sincere, honest, and above-board as a witness.

CONCLUSIONS

100. As the findings above predict, the Examiner is convinced, and so concludes, that all issues in this proceeding, as a matter of simple equity, ought to be resolved favorably to the applicants. At the risk of repetition, let it be stressed, nevertheless, that the record is totally barren of evidence casting any kind of aspersion whatsoever upon the operation, management or programming in the public interest of Mr. Vogel's radio stations, both past and present; that to the extent the plethora of details in the many documents prepared and filed with this Commission by Mr. Vogel disclose so-called "inconsistencies", the latter were either satisfactorily explained by Mr. Vogel or were of a character that could only be described as minutiae;[19] that the Commission, the record herein discloses, was at all times aware as to what

[19] Citation by the Broadcast Bureau of *FCC* v. *WOKO* (1946), 329 U.S. 223, for the generally accepted legal principle that the fact of concealment is often of more importance in Administrative Law than the facts concealed is totally valueless to the resolution of the controversy touched off in the present case. For, how can there be an adjudication of "concealment" against Mr. Vogel and his associates when the facts show that the Commission knew, or should have known, as a matter of law, most of the information allegedly concealed from it, and the evidence of record established no convincing motivation for their having concealed anything? Indeed, one is left to wonder whether Mr. Vogel may have been "entrapped" into making inconsistent assertions through Staff interrogation of matters the Staff could have resolved simply by investigation of the files.

Mr. Vogel's past broadcast interests were and its Staff could easily have ascertained this data with the flick of a finger; and, in any event, that Mr. Vogel had no discernible, believable motive to conceal such information by omitting to answer the application questions completely. Further, it is concluded that the accusation of "trafficking in broadcast authorizations" that has been lodged against Mr. Vogel (Issue II) is without any merit, especially in the light of the recorded facts that Mr. Vogel has not sought to dispose of any of his broadcast interests since the year 1966; that he has *acquired* several such interests in recent years with the full knowledge and consent of this Commission and is seeking to *acquire* one such additional interest by one of the applications on which this very proceeding is predicated; and that unrebutted evidence of record herein demonstrates that Mr. Vogel's broadcast history includes the extended operation by him of stations which had been quite unprofitable, coupled with no complete, consistent pattern of selling any stations at other than reasonable profits and after reasonable periods of operation by him.

101. Although the Examiner believes that the facts touched lightly upon above and the additional details in the findings, *supra*, speaking for themselves, clearly and unequivocally lay to rest any lingering suspicions of "trafficking" by Mr. Vogel and his associates, it may be profitable in regard to this matter to advert briefly to the findings and conclusions of this Hearing Examiner in *Re: City of Camden (Assignor) and The McLendon Corporation (Assignee)*, 18 FCC 2d 427, *et seq.* (1969). There the Commission, on appeal, declined to rule on the "trafficking" issue or even to discuss it (18 FCC 2d at 426). However, in *Camden* there was programming evidence in addition to financial detail evincing a pattern of profitable station operations by the McLendons. Yet, among other reasons, because the evidence showed ". . . the McLendons utilized profitable operations to subsidize losing ones; and running through their entire operation is the programming thread which demonstrates their continual interest in serving the publics they were licensed to serve" (18 FCC 2d at 447), the Examiner could not find the McLendons guilty of the offense of "trafficking", as that offense has been defined in the leading case precedent (*Harriman Broadcasting Co.* (*WXXL*), 9 FCC 2d 731, 737), namely, licensees treating their stations "as properties to be bought and sold at a profit rather than as facilities reasonably to be devoted to serving the public". (*Ibid.*) The facts in the present proceeding disclosing, as they do, a consistent pattern of Commission approvals of Vogel applications without a single query either by the Commission or its Staff concerning the programming of the stations, including the approval of several renewal applications, warrant at least an inference that Mr. Vogel's stations have always performed in the interest of the public they are, or were, licensed to serve. Indeed, under *all* the facts of the case, the Examiner feels compelled to conclude that it borders little short of preposterous that a 15-year record of consistent Commission application approvals, during which a myriad of details involving Mr. Vogel, some of which may look superficially to be "inconsistent", was necessarily compiled, would result in the first place in a charge of "trafficking". On the basis of the facts that have been unearthed in the present record, no businessman, and no individual doing business

under government licensing, can feel protected from arbitrary government action short of an expensive public hearing, with bumbling-stumbling bureaucrats somewhere down the line trying desperately to do him in. The Examiner is convinced, and unhesitatingly recommends, that the Commission henceforth take the steps needed to improve the processing of transfer and assignment applications so that, for the future, more specific and objective responses to questions on the application forms, calling for applicants to set out reasons for seeking to sell or to acquire broadcast facilities, will be forthcoming. Either serious and explicit responses to the questions ought now to be required, thereby putting a quick end to the platitudes one sees in nearly all transfer or assignment of license applications, or the questions should be deleted from the forms as a source of bureaucratic harassment.

102. The Examiner agrees herein completely with paragraphs 1–4 of the Broadcast Bureau's proposed conclusions of law concerning the engineering issue. These conclusions are hereby adopted and deemed to be incorporated herein by reference. It is thus concluded ultimately, "weighing the need for aural service to these areas and populations which would gain or lose service, together with the fact that Jackson would receive a second nighttime local broadcast outlet" (Bureau's proposed conclusions, para. 4), that there is a "need" for the additional transmission service in Jackson, Alabama which outweighs the "need" for service in the so-called "loss area".[20]

103. Based upon the entire record herein and the foregoing findings and conclusions, it is concluded ultimately that the public interest, convenience and necessity will be served by granting both applications herein.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Rule 1.276, the application for the Commission's consent to the Assignment of License of Station WMAF, Madison, Florida, from WMAF Radio, Inc. (Assignor) to the Vogel-McCreery Corporation (Assignee) is hereby GRANTED; and the application of Vogel-Ellington Corporation (WHOD), for a construction permit authorizing it to change the facilities of standard broadcast station WHOD at Jackson, Alabama from operation as a Class III station on the frequency 1290 kHz with 1 kilowatt power, daytime only, to unlimited time operation as a Class IV station on the frequency 1230 kHz with 1 kilowatt power daytime and 250 watts at night, is hereby also GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DAVID I. KRAUSHAAR, *Hearing Examiner.*

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[20] Obviously, if the WHOD application is denied the public that stands to gain a benefit from the service improvement will be denied the benefit. Moreover, the fact that Mr. Vogel is trying here to improve the service rendered by one of his stations and has pursued his application to do so through a long hearing process, that began long before the so-called "trafficking" issue came into the case, indicates his sincerity and negatives the idea that he is, at present at least, "trafficking" in licenses.

F.C.C. 73-781

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of WESTERN UNION TELEGRAPH CO. Revision of Tariff F.C.C. No. 254 and WESTERN UNION TELEGRAPH CO. Revision of Tariffs F.C.C. Nos. 240 and 258	Docket No. 19546 Docket No. 19696

MEMORANDUM OPINION AND ORDER

(Adopted July 18, 1973; Released July 23, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. Microwave Communications, Inc. (MCI) has filed with the Commission a motion requesting consolidation of the hearings in Docket Nos. 19546[1] and 19696.[2] The Western Union Telegraph Company (Western Union), Respondent in both proceedings, submitted an opposition to this motion to which MCI replied. These proceedings constitute investigations, respectively, into Respondent's departure from uniform nationwide pricing,[3] and into its recently imposed higher charges for TWX and Telex service.[4] MCI asserts that by these rate actions Respondent is attempting to utilize revenues generated from its monopoly sector services to cross-subsidize those offerings facing competition, that the proceedings are therefore interrelated, and that the hearings should accordingly be consolidated. Respondent contends, however, that TWX and Telex earnings remain deficient, despite the rate increases, and cannot be availed as a source of subsidy. It objects to consolidation on the further ground that the proceedings involve unrelated subjects which should be examined severally.

2. We deny MCI's motion, for we agree with Respondent that the proceedings will focus on questions so widely divergent that their resolution is neither necessary nor practical in one forum. We believe that the inquiry into the relevant costs, revenue requirements, and policy standards[5] pertaining to the private line rates for the Chicago-St. Louis route is not dependent upon the evidence relevant to the reasonableness of the TWX and Telex rates under investigation. Similarly, we believe that we may resolve the lawfulness of the latter rates without concurrently examining the evidence in justification of the Chicago-

[1] Instituted by *Memorandum Opinion and Order*, released July 25, 1972; 32 F.C.C. 2d 975 (1972).
[2] Instituted by *Memorandum Opinion and Order*, released March 6, 1973; 39 F.C.C. 2d 977 (1973).
[3] Respondent has established rates on the Chicago, Illinois and St. Louis, Missouri, unlove to that route, matching rates for similar services furnished by MCI.
[4] MCI alleges that TWX and Telex are monopoly services.
[5] *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971).

St. Louis filing. Treating such severable questions in one hearing, moreover, would be administratively unwieldy and would unduly protract each proceeding.

3. Accordingly, IT IS ORDERED, That the motion of MCI is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-665

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE WESTERN UNION TELEGRAPH CO., NEW YORK, N.Y. Reduction in Hours of Service at "UJ" Public Branch Office, 75A New Street, New York, N.Y.	File No. TD-20479-2(2)

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND COMMISSIONER HOOKS ABSENT.

1. On September 27, 1972 (released October 4, 1972) we adopted as our final Decision in Docket 19267 the findings and conclusions of the Recommended Decision and Order of the Chief, Common Carrier Bureau. (37 FCC 2d 813 :1972). This proceeding concerned an application (TD-17972) filed by The Western Union Telegraph Company to discontinue 22 company-operated offices in the lower Manhattan area of New York City, with alternate service to be provided essentially through a new proposed Public Message Center to be established at 18 John Street. One of the facilities proposed for closure was "UJ" public branch office at 75A New Street, which is open 24 hours per day, 7 days a week. In our Decision we authorized the closure of 21 of the subject offices, upon establishment of the PMC and fulfillment of certain other conditions, but denied that portion of Western Union's application as it concerned over-the-counter facilities at "UJ" office. The record showed a high volume of traffic filed over the counter at that office (something in excess of 200 messages per day) and at two nearby offices (78 messages per day), and in light of these traffic volumes originating at or in the general vicinity of "UJ" branch, we concluded that a public facility for the acceptance of messages over the counter should be retained at or near the "UJ" location. The PMC was established early in December 1972, and "UJ" office has continued to provide counter acceptance service 24 hours per day at its original location.

2. Western Union has now filed an informal application (TD-20479-2(2)) under Section 63.68 of the Commission's Rules to reduce the hours of service at "UJ" branch from the present "always open" status to 9 a.m. to 10 p.m., Monday through Friday and closed Saturday and Sunday.[1] Section 63.68 of the Rules permits a telegraph carrier

[1] The informal application filed February 21, 1973 proposed open hours from 10 a.m. to 10 p.m., Monday through Friday, but was modified by amendment filed April 23, 1973 to provide for the longer spread of hours of 9 a.m. to 10 p.m.

in lieu of filing formal applications to file informal applications to reduce hours of service at branch offices where weekday hours (Monday through Friday) will not be reduced below a minimum of 8 hours per day, and alternate service will be available at a company-operated main or branch office located in the community, which will be opened during the hours to be deleted and will have equal or better pickup and delivery facilities during those hours which will be available to the area served by the office at which hours will be reduced. If the substitute office is located more than one-quarter mile, but not more than one mile from the office at which hours are to be reduced, the normal outgoing traffic volumes during those hours must not exceed an average of 4 messages per hour during the total hours to be deleted and 6 messages per hour during the maximum traffic hour. Should the substitute office be closer than one-quarter mile, higher traffic volumes of 6 and 8 as specified in Section 63.68(3)(iii) are qualifying, and, if the alternate office is greater than one mile in distance, traffic volumes can not exceed an average of 2 and maximum in any one hour of 4 messages. The traffic volumes are to be determined by studies made during the latest normal month with respect to conditions generally affecting traffic volume. Applications filed under this section of the Rules are deemed granted effective as of the 15th day following the date of filing unless the Commission notifies the carrier within such 15 day period not to make such reduction. Upon written request from the Commission at any time within 6 months from the effective date of a reduction in hours as authorized under this section, the carrier is required to reestablish the hours observed before the reduction.

3. The company submits the subject application as meeting the requirements of Section 63.68, based on the study month of November 1972. The Public Message Center at 18 John Street, .4 of a mile distant, will provide alternate counter acceptance service during the hours to be deleted. The application shows an average hourly number of messages filed during the total hours to be deleted of .5 of one message and 3.0 messages filed during the maximum traffic hour.[2] However, the application states that 64 mailgrams filed during the month by a single customer between the hours of 2 a.m. and 4 a.m. on Saturdays were excluded from the study, which if included would increase the maximum traffic hour to 10, exceeding by 4 messages the requirements of the rules. For this reason and also because of the involvement of "UJ" in Docket 19267, Western Union was notified within the 15-day waiting period not to reduce the hours of service at the office, pending further order from the Commission.

4. Western Union International, Inc. (WUI) has filed a Petition to Dismiss, Deny or Reject the application for authority to reduce hours of service at "UJ" office, contending principally that The Western Union Telegraph Company is obligated by our Decision in

[2] The amendment filed April 23, 1973 retaining the one-hour period 9 a.m. to 10 a.m., Monday through Friday, changed these volume figures to .3 and 1.5 messages, respectively.

Docket No. 19267 to maintain the "always open" status of that office. The international carrier claims that denial in Docket No. 17972 of that portion of Western Union's application to close "UJ" office constitutes a dismissal with prejudice; that a denial of the request for full closure of the office necessarily includes a denial of a request for substantial closure; and that our procedural rules do not permit consideration of a like application filed by the same applicant within twelve months from the effective date of the Commission's action. Finally, WUI contends that the application is in violation of the section of the rules under which it is filed, in that November 1972 rather than January 1973, was used as the "latest month for which traffic statistics are available" in making the traffic volume measurements required by the rules, and that Western Union's own statistics show a traffic volume during the average maximum traffic hour in excess of the maximum stated in Section 63.68. No other protests have been received.

5. In an Opposition to WUI's pleading, Western Union generally refutes the contentions of the international carrier that the Commission's action in Docket 19267 bars consideration of the instant application, and argues that the application is wholly consistent with the requirements of Part 63 of the Commission's Rules.

6. We will first give attention to the question of whether the circumstances surrounding the UJ application qualifies the office for consideration under Section 63.68 of the Rules. Western Union contends that exclusion of the 64 mailgrams filed between 2 a.m. and 4 a.m. on Saturdays from the hourly traffic data for the study month was not improper as the customer had agreed prior to submission of the application, and as noted in the application, to use an alternate means of filing these messages. We have confirmed with this patron of the telegraph company (Blyth Eastman Dillon) that since early January 1973, any accumulation of mailgrams for transmission during early morning hours is being picked up by messengers dispatched from the PMC at 18 John Street in lieu of over-the-counter filing at "UJ", and that this arrangement is satisfactory. The customer is located about equal distance between the PMC and "UJ" office. Statistical data in the application showing hourly distribution of load documents that, aside from the subject mailgrams, there was virtually no load handled during the entire spread of Saturday hours to be deleted. Although WUI in its pleading raises a technical point, as hereinafter discussed, concerning the selection of November as the study month, there is no contention by this carrier or other indication that the traffic volume figures presented, exclusive of the mailgrams no longer filed at "UJ", do not reflect normal traffic conditions existing at this time. Under the above circumstances, we see no compelling reason to reject consideration of the application under the procedures of Section 63.68.

7. We find no merit in WUI's argument that the application be rejected because it is based upon a November study month while bearing the date of February 20, 1973, and thus, in WUI's view, fails to meet the requirements of the Rules specifying that traffic must be

measured "during the latest month for which traffic statistics are available." Western Union advises that December was not considered a normal month because of the holidays, and asserts that in view of the work required to compile the results of the special studies and prepare the application, the month of January, 1973 can not be considered to be "available" from a practical point of view. It is not unusual for informal applications to be based on a study month other than the most current, and absent any indication that November is an atypical month there would appear to be no useful purpose served by requiring Western Union to resubmit the application based on a month subsequent to November 1972, or to refile under the more burdensome requirements for formal applications.

8. We will now turn to the matter of whether Western Union is obligated by our Decision in Docket No. 19267 to maintain the "always open" status of the "UJ" office. WUI contends that the Commission has determined that a 24-hour office at 75A New Street is required in the public interest, and consequently Western Union's informal request to reduce hours of service at that office should be rejected. We disagree with this premise. Our Decision did not specify any particular hours of service at "UJ" branch. We were concerned with the indicated high volume of domestic traffic filed over the counter at "UJ" and the interests of international service users in the neighborhood who prefer to route their messages by international carriers, such as WUI, who do not maintain their own offices in lower Manhattan, and thus found that retention of a public facility for acceptance of messages over the counter should be retained at or near the "UJ" location to meet this demand. Western Union in the subject application (TD–20479–2–(2)) has demonstrated that public usage of the counter facilities at "UJ" during the hours to be deleted is minimal. Moreover, the company states that during the study month there were no international messages filed at the branch office during the periods proposed for reduction. Thus, the demand indicated by the record in Docket No. 19267, and upon which we based our requirement for retention of the facility would appear to occur during hours not affected by the subject application.

9. The criteria and standards contained in Section 63.68 of the Rules were adopted by the Commission some 20 years ago. Since that time the Commission has gathered substantial experience with their application in the context of maintaining adequate public service. This experience has demonstrated that the standards reflected by our rules comport with fair and realistic service objectives and the interest of the public in the availability of adequate and acceptable telegraph service insofar as public office facilities are concerned. While these rules are not necessarily dispositive of each application filed thereunder, they nevertheless, in the absence of countervailing evidence, provide appropriate guidelines for testing the merits of proposed reductions in hours of service. No such countervailing evidence has been presented in this instance.

10. We are not persuaded by the arguments of WUI that the ap-

plication to reduce hours at "UJ" office should be rejected or denied, and find, on the contrary that, in view of the minimal traffic loads during the hours to be deleted and availability of an alternate office only .4 of one mile distant, the public convenience and necessity would not be adversely affected by the proposed reduction.

Accordingly, IT IS ORDERED, That Western Union's application TD-20479-2-(2)) IS GRANTED.

IT IS FURTHER ORDERED, That the Petition to Dismiss, Deny or Reject filed by Western Union International, Inc. on March 7, 1973 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*